

**VERBATIM****RECORD OF TRIAL<sup>2</sup>**(and accompanying papers<sup>1</sup>)

of

MANNING, Bradley E.

(Name: Last, First, Middle Initial)

PFC/E-3

(Rank)

Headquarters and

Headquarters Company,

United States Army Garrison

(Unit/Command Name)

U.S. Army

(Branch of Service)

Fort Myer, VA 22211

(Station or Ship)

By

**GENERAL****COURT-MARTIAL**

Convened by

Commander

(Title of Convening Authority)

UNITED STATES ARMY MILITARY DISTRICT OF WASHINGTON

(Unit/Command of Convening Authority)

Tried at

Fort Meade, MD

(Place or Places of Trial)

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1 MJ: Yes.

2 TC[MAJ FEIN]: So, I guess first, just so I understand, Your  
3 Honor, what is our position on offering that to prove or disprove  
4 that fact?

5 MJ: Yes. Well, whether it is relevant to that fact, or not.

6 TC[MAJ FEIN]: Yes, ma'am. So first, not relevant; this is  
7 actually exactly what I was pointing out before. It is impossible  
8 for the accused, at the time he committed the crime, to know of this  
9 information as it had not happened yet. Damage, or lack thereof, has  
10 not occurred.

11 MJ: All right----

12 TC[MAJ FEIN]: And even--I am sorry, Your Honor.

13 MJ: ----Go ahead.

14 TC[MAJ FEIN]: Just one more point on that. It would be--and in  
15 fact, that single position would essentially be nonsensical because  
16 ultimately what that would do is incentivize an accused that has been  
17 charged with these types of crimes to continue committing a crime  
18 until there is damage, and only then would it become--would they be  
19 charged. This is a--these charges are to prevent the disclosure of  
20 information or theft of information.

21 MJ: Run that by me again.

22 TC[MAJ FEIN]: Yes, Your Honor. All of the specifications under  
23 Charge I and Charge II are either to hold an accused accountable,

1 criminally accountable for either ultimately the theft of information  
2 or the transmission to, ultimately, to persons not authorized through  
3 different means, different methods, different people. But, that is  
4 how it boils down to those two major buckets. Under those two major  
5 buckets, the crimes are completed at the theft or purloining or  
6 converting, or at the time of the transmission. So, whether the  
7 accused had "reason to believe" had to be formulated at that time.  
8 If the Court was to adopt the defense's position then that means that  
9 the offense hasn't occurred until there has been harm or lack of  
10 harm. So, if an accused is to do this covertly and not ever get  
11 caught for transmitting or stealing information then that would  
12 somehow mean that their "reason to believe" was possibly reasonable  
13 up until when they got caught and caused the damage. The purpose of  
14 these statutes, the purpose of the spec 1 of Charge II, Article 104,  
15 is to hold someone accountable for the act at the time it is  
16 committed.

17 MJ: Well, I think--and the defense will tell me what their  
18 position is, but I think their position is going to be that the  
19 actual damage is relevant to show whether the information could be  
20 used to the injury of the United States or the advantage of any  
21 foreign nation.

22 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: The *ex ante*, if it did not cause it, so why would it be  
2 that type of information.

3 TC[MAJ FEIN]: Yes, Your Honor. And so, it goes back to--again,  
4 I am trying not to rehash what was said previously, but I think this  
5 was addressed last time and that is simply that someone's testimony  
6 today, or a damage assessment, or whatever evidence the defense would  
7 offer does not, at all, one way--is not probative at all to whether  
8 something could cause harm, because--just because someone takes the  
9 stand today and says there was no harm, does not mean that that  
10 document could not cause harm. Therefore, the accused, at the time  
11 of the commission of the crime, did or did not have, "reason to  
12 believe"; because, tomorrow, there could be harm. And under an  
13 infinite amount of hypotheticals, if somebody was called to the stand  
14 and evidence was elicited from them that it did cause harm and then  
15 the next day, it did not cause harm, this would be a never-ending "do  
16 loop" of what could or could not happen. The reality is that the  
17 entire federal structure of classified information from what dictates  
18 what is classified to the laws that enforce the classification, to  
19 the nondisclosure agreements that cite the rules, the laws that  
20 enforce this, all the way across the board, is all based off of a  
21 competent authority determining something is classified because it  
22 could cause harm to national security under the criteria under the  
23 Executive Order 13526.

1 MJ: All right, let's move on to the cross-examination of the  
2 OCA, Original Classification Authority.

3 TC[MAJ FEIN]: Yes, ma'am.

4 ACC: What is the Government's position; I believe the defense  
5 position would be something to the effect of, "If the OCA says, 'yes,  
6 I classified this for the following national security reasons, A, B,  
7 C, D, and E. I thought it would only cause damage here, here, here,  
8 and here.'" And the cross-examination will be, "well, it did not  
9 cause damage, so, doesn't that challenge the wisdom of your decision  
10 to classify it in the first place?"

11 TC[MAJ FEIN]: Yes, ma'am. So, first and foremost, OCA or the  
12 equivalent takes the stand to testify about the national security  
13 nature--or really to the OCA--the portions that are classified; takes  
14 the stand and talks about classified information. They are solely  
15 focused on what information went into their decision-making to say  
16 that that document was properly classified at the time of the  
17 commission of the crime. That is the evidence they are using to make  
18 that determination. They can be cross-examined on that. They could  
19 be cross-examined on, "General, Vice Admiral 'fill in the blank',  
20 your experience is in naval warfare and you are commenting on ground  
21 troop movements." They can--the defense is fully able to impeach  
22 that OCA's credibility on their knowledge and how they can actually  
23 make that decision to classify something based off of their training,

1 their experience, their education; their training, especially  
2 classifying material. So, they still have that ability. But in  
3 order--what the defense wants to be able to do is then take  
4 information that first--the assumption the defense is making is that  
5 these individuals that would be testifying had anything to even do  
6 with the damage assessments. So, it is really not impeaching their  
7 credibility, it is using collateral evidence in order to try to  
8 attack the facts, their opinions they are espousing. But, if they  
9 are trying to use those damage assessments or any evidence of damage,  
10 or lack thereof, again, it is based off of information that occurred  
11 after the fact. All the person is testifying to is whether it was  
12 properly classified; ultimately, whether it is closely held national  
13 defense information, or not. And, if it is, then the government has  
14 met its threshold for proving the one element or ultimately, the  
15 trier of fact believed it is, or is not. Defense can cross-examine  
16 them. But, it goes back to, the statute says that the accused  
17 "reasonably believed". The statute--the executive order says that if  
18 it is classified that it could cause harm and that is the sole  
19 purpose of their testimony. And, Your Honor, *Diaz*, great example--is  
20 a great example of this principle. The *Diaz* Court held--and, let me  
21 find this case, Your Honor, so I can give you the pin point. [Pause]  
22 I am searching for the page number, Your Honor, for the actual case.  
23 Your Honor, the *Diaz* Court at page 133 held, "That classification

1 alone does not satisfy the *mens rea* requirement of 793(e)." And, the  
2 government does not contest that at all. The classification decision  
3 or the classification alone is just a factor in determining whether  
4 it is national defense information being closely held. The *Diaz*  
5 Court then goes even further to explain all of the other evidence  
6 that was presented at the *Diaz* Court-martial in order to explain why  
7 it was a violation of 793. That goes to *Diaz*'s background as an  
8 attorney at GTMO, the training he received unclassified systems, the  
9 databases he had access to and that training, and so on, and so  
10 forth. ACCA did the same in *Steele*, Your Honor. Classification  
11 alone is not good enough but then even ACCA went out of their way to  
12 list all of the other evidence the government presented in addition  
13 to the classified nature of the compromised information to show, this  
14 is the knowledge, this is how we are proving it was closely held and  
15 he knew it to be closely held. It is not classification alone. This  
16 isn't being developed into some strict liability case once an OCA  
17 testifies something is classified then we are done with that charge.  
18 It is just one of many factors that can be impeached; just not,  
19 again, with actual damage.

20 MJ: Major Fein, let me just ask you a couple of questions. I  
21 want to make sure I understand your motion completely. The original  
22 29 March 2012 motion was to preclude the defense from raising or  
23 eliciting any discussion, reference, or argument, to include the

1 introduction of any documentary or testimonial evidence relating to  
2 the actual harm or damage from pretrial motions. Now, why would you  
3 want to do that?

4 TC[MAJ FEIN]: Well, Your Honor, now it is four months later we  
5 are past all of that that. The whole idea was to get clarification  
6 from the Court going forward. Really, it was for judicial economy so  
7 both parties are in the same, you know, operating on the same  
8 guidance, the law, that is going to be used in this case. So that  
9 was the purpose there.

10 MJ: All right so is the Government still asking me to do that?

11 TC[MAJ FEIN]: Well Your Honor, ultimately the government is  
12 asking for a ruling on whether it is relevant for the merits and that  
13 would drive whether pretrial motions, based on the merits, it would  
14 be relevant then. So, no, not in addition to--

15 MJ: Okay. And, you have, "On the merits portion of the trial  
16 and pretrial motions relating to the merits portion of the trial."  
17 Is the Government's motion going beyond the mention of actual damage?  
18 For example, if there is something in the damage assessment that  
19 describes the nature of the piece of evidence that was classified, is  
20 not talking about damage, it is just an ancillary part of the--that  
21 is where you get that information is from a damage assessment.

22 TC[MAJ FEIN]: Correct, Your Honor.

1 MJ: Is the government moving to preclude the defense from using  
2 that type of information?

3 TC[MAJ FEIN]: No, Your Honor. And, what I neglected to do  
4 prior to the session, though I have had plenty of time, is to make  
5 sure that we never intended to--I do not think we ever used the word,  
6 "damage assessment." The government has always used, "damage", and  
7 should have actually been more specific and said, "Damage to national  
8 security." So, damage assessments have a lot of information in them,  
9 as the Court is alluding to, and the government agrees, but it is the  
10 use of actual damage being relevant on the merits that the government  
11 is moving to preclude. If there is other ancillary information in  
12 the damage assessment, absolutely. I mean, many of the damage  
13 assessments explain the data that Private First Class Manning has  
14 been charged with. It is not focused on damage to national security,  
15 is just a general explanation, either classified or unclassified.

16 MJ: Okay. So, I guess I will use the example the defense used.  
17 So, if there was something in assessment saying something about  
18 someone being referred to by initials rather than name, that is part  
19 of--that is within the nature of the information that, for example,  
20 the OCA has classified. So, that would be something that the OCA  
21 would have known about at the time he made classification decision,  
22 even though that information is found in the damage assessment.

1       TC[MAJ FEIN]: Absolutely, Your Honor. And, that is why I go  
2 back to what I did not verify prior to this session was that we never  
3 used the term, "damage assessment." We are only focused on damage to  
4 national security. Damage assessment is a document. As the defense  
5 has received almost all of them at this point that were produced  
6 throughout government, they are documents. But, the government  
7 intends to call, for sentencing, expert witnesses to talk about the  
8 damage to national security, damage to the United States, in  
9 sentencing. It would be--if the defense wants to stipulate to us  
10 using a damage assessment, it would just make, you know, possibly our  
11 sentencing case easier. We do not intend the actual assessment; in  
12 no case, have we tried to preclude or intent to preclude the defense  
13 from using the damage assessment itself, it is only the damage or  
14 lack thereof contained within it. And, for the specific example of  
15 initials, I think there might be some confusion there also, Your  
16 Honor. Slowing down a little how I will say this, but----

17       MJ: It will not surprise me if I am confused, but go ahead.

18       TC[MAJ FEIN]: No, Your Honor. Just to make sure I do not have  
19 a spillage myself. Again, I am guessing--or I am interpreting what  
20 the defense intended, but initials might have been used in certain  
21 reports that were compromised. Because those initials were used in  
22 some light, that might not be considered as a breach of national  
23 security or something that would be a compromise of national

1 security. But, in other light it might be. That information, the  
2 government contends, absolutely that is what the OCA is testifying  
3 about; or the government expert. If they are holding up a document,  
4 or not holding up because we are in open session, and saying these  
5 are the reasons that this is properly classified and this is what it  
6 means, the defense picks that document up, has information they have  
7 learned throughout all of discovery, regardless of the source, so  
8 long as they provide proper notice if it is classified, and they want  
9 to cross examine on that. The government agrees, they should be able  
10 to do that; just not on whether actual damage or lack thereof, to  
11 national security occurred. Not until sentencing.

12 MJ: All right, I think I understand the Government position.

13 TC[MAJ FEIN]: Was there anything else on that list, Your Honor?

14 MJ: Evidence of the actual damage is relevant to whether the  
15 accused acted wantonly in specification 1 of Charge II.

16 TC[MAJ FEIN]: Ma'am, could we have one moment?

17 MJ: Yes.

18 [Pause]

19 TC[MAJ FEIN]: Ma'am, just to repeat the question to make sure I  
20 understand it. The defense's contention that damage, or lack  
21 thereof--actual damage or, lack thereof, could be used to prove  
22 whether--or disprove whether the accused acted wantonly. Go back to,  
23 this is first and foremost a timing issue. The accused could not

1 have possibly known, in fact, no one in the world could have known  
2 whether damage, or lack thereof, actually occurred until after the  
3 act, because that is the impetus, the direct cause, possibly  
4 proximate cause, of the damage, or lack thereof. So, whether that  
5 would inform the accused's decision and his acts of being wanton,  
6 there is plenty of ways defense could put evidence on about at the  
7 time, like I listed before about testing the reasonableness, but  
8 whether damage occurred or not is immaterial, irrelevant to that  
9 fact.

10 MJ: All right, I understand the Government position.

11 TC[MAJ FEIN]: Thank you, Your Honor.

12 MJ: Mr. Coombs?

13 CDC[MR. COOMBS]: Yes, Your Honor. Your Honor, the defense has  
14 given its argument on the motion to preclude harm before, but I want  
15 to reiterate a couple of the positions that the defense had, also go  
16 into what Court asked both the parties to brief on whether or not  
17 what did happen could be relevant to what could happen and then, of  
18 course, address any of the issues that the Court believes further, it  
19 needs to be made. I want to start off by saying that as far as the  
20 defense is concerned, not truly understanding the government's  
21 position at all. The government does not cite any case for its  
22 request of the Court to preclude harm from being mentioned during the  
23 merits, absolutely no case. It also is confusing just on the very

1      nature of what they requested. And, even in the explanation by Major  
2      Fein, to be honest, I do not understand the government's position.

3            MJ: Well, I think the government position is that if you are  
4      bringing it up for relevance to show what the accused's state of mind  
5      was at the time of the disclosures, what happened after the  
6      disclosures is irrelevant because the accused did not know it at the  
7      time he made the disclosures.

8            CDC[MR. COOMBS]: Well, the information, at that point though,  
9      that is only one way to look at that information. And also there is  
10     no--if you are going to just do a straight relevancy standpoint, it's  
11     not only relevant to what the accused knew at the time as far as the  
12     damage.

13            MJ: Okay.

14            CDC[MR. COOMBS]: So, if the accused believed that the damage  
15     could, you know, information could not cause damage then that would  
16     be relevant to whether or not the accused belief was, if it is a  
17     general intent crime, honest and reasonable.

18            MJ: Are any of these general intent crimes?

19            CDC[MR. COOMBS]: Well, the--I guess, no. So, it would be  
20     honest, as far as the 793 offenses that they charged.

21            MJ: So, if it is an honest belief, how is that relevant at all  
22     to state of mind?

1           CDC[MR. COOMBS]: It might not be relevant to the reasonableness  
2 aspect of it, but the honest part, again, it would be some evidence  
3 to show whether or not he could have an honest belief based upon the  
4 opinion there. But then not only that, the other aspect of this that  
5 is missing is that the statute requires them to prove that it could  
6 cause damage. And, the one case that they cite that they try to make  
7 believe, I guess, supports them in some way is the *Diaz* case. And,  
8 if the Court would go back to where Major Fein asked the Court to  
9 look in the *Diaz* case, it talks about the fact that, "Surely  
10 classification may demonstrate that an accused had reason to believe  
11 that the information relates to national defense and could cause  
12 harm. However, not all information that is contained on a classified  
13 or closed computer system pertains to national defense. Likewise,  
14 not all information that is marked as classified in part or in whole  
15 may, in fact, meet the criteria for classification. When you look  
16 down further you see in a footnote, footnote 4, the Court, when it is  
17 considering whether or not this could cause damage, they say, "What  
18 injury might ensue and why was the subject of more than 40 pages of  
19 classified testimony from Paul Rester, a civilian employee of the  
20 defense intelligence agency." Even in the *Diaz* case they had----

21           MJ: Say that one more time, I am sorry.

22           CDC[MR. COOMBS]: They said, "What injury might ensue, and why  
23 was the subject of more than 40 pages of classified testimony from

1 Paul Rester, a civilian employee of the Defense Intelligence Agency,  
2 who at the time of trial, was the director."

3 MJ: That says, "might ensue," though, right?

4 CDC[MR. COOMBS]: Right, so as far as--yet, in this instance  
5 they would still be talking, probably, about what their belief was as  
6 to the damage. The government talks--and we will see this in the  
7 Department of State, they like to say that a damage assessment is  
8 just a snapshot in time. It is just the--what we know at this point.  
9 And, that "could happen" continues forever. And, in the future,  
10 maybe 50 years from now, we will say, "Oh, here was the damage that  
11 was caused. But, the issue of whether or not this could cause  
12 damage, the government has to offer some proof of that. And, in  
13 Diaz, they looked at other pieces of evidence such as the accused's  
14 training, knowledge, but you could just as easily look at what was  
15 the government's own statements regarding whether or not it caused  
16 damage. The defense's position would be that is--this is not a  
17 creation of the defense. This is the government's own statement as  
18 to whether or not this caused damage.

19 MJ: But how--we are talking about after-the-fact; something  
20 that had not happened at the time of the disclosures. So, whether  
21 there was reason to believe that injury could be caused to the United  
22 States or to the advantage of any foreign nation, that would be on or  
23 before the date of the disclosures. I am confused on how any

1 statements afterwards on whether the damage did or did not occur is  
2 relevant to what everyone was thinking or what was relevant and what  
3 was at issue on the date of disclosure.

4       CDC[MR. COOMBS]: Yeah, it goes to whether or not the accused  
5 had a reason to believe that this could cause damage. So, the  
6 offense of, "Does the accused have reason to believe this could cause  
7 damage", that element, if the defense's position is, "because I had  
8 access to a lot of different information, I chose what information I  
9 believed could not cause damage." Then, whether or not that actually  
10 did cause damage at a later date is relevant to whether the  
11 reasonableness of that belief--whether or not that belief was, in  
12 fact, correct. Is also is relevant to the charged offense, whether  
13 or not the information really could cause damage. So, when you look  
14 at some of the other-the cases that we have cited, going back to the  
15 assault example, the *Hudson* case. And, this is in--assault with  
16 assault with a means likely to produce death or grievous bodily harm.  
17 In the *Hudson* case, the Court looked at the risk of harm versus the  
18 magnitude of the harm. And, in that case, you had an assault--  
19 spousal assault and individual was charged with assault with means  
20 likely to produce. The Court, and considering that, took a look at  
21 whether or not the alleged victim in that case had any injuries.  
22 And, when the Court looked at the fact that there were no injuries,  
23 the Court determined that in that instance, it was not assault with a

1 means likely. So, they used what did happen in order to educate them  
2 on what could happen at the time. Likewise, the *Outhier* case is the  
3 same way where that one was involving another assault with means  
4 likely, a swimming instructor, where the individual was not injured  
5 and the Court again looked at this and said, "While it is not  
6 necessary to prove harm or lack thereof," much like the government's  
7 arguing here, "This is often the linchpin between a means that is  
8 used in a manner likely to produce death or grievous bodily harm and  
9 one that is not." In the *Outhier* case, the Court looked at the lack  
10 of harm in order to say that it could not cause harm. In *Joseph*,  
11 again, the Court looked at this and when they looked at what could  
12 cause--what could be a means likely to produce death or grievous  
13 bodily harm, they said that is a determination for the panel members;  
14 that the information of what did happen in that instance should be  
15 given to the panel members in order for them to determine whether or  
16 not it could happen at the time that the assault was done by *Joseph*.  
17 So, in this instance, the government is, much like in the *Outhier*  
18 case, is making the argument that we do not have to prove harm. We  
19 do not have to prove actual harm, and, the defense is not saying they  
20 have to. But, the issue here is, if the information did not cause  
21 harm that is a relevant fact to, at the time that was released,  
22 whether or not it could cause damage, and one factor that the panel  
23 members can consider when deciding whether or not you have a 793

1 violation. And, even though the government tries to back away from  
2 this, the Diaz Court says there, classification alone does not save  
3 the day. They still have to offer some evidence that this could  
4 cause damage. That one fact there, you have to offer some evidence  
5 that this could cause damage, should also conversely allow the  
6 defense to offer some evidence that this could not cause damage.  
7 And, a relevant factor in this instance is that it did not, in fact,  
8 cause damage.

9 MJ: If I follow your logic, then I would have to allow the  
10 government in their case in chief to show evidence of actual damage  
11 as well, is that correct?

12 CDC[MR. COOMBS]: That is correct. And, one of the main reasons  
13 the government is arguing at this point is because the damage is  
14 speculative at best or minimal at best. That is the main reason they  
15 do not want this information to be decided in the merits portion or  
16 brought out in the merits portion because if it is brought out in the  
17 sentencing portion and are successful, then it is too late at that  
18 point for the panel members to go, "Well, maybe the stuff really  
19 could not have caused damage." Because, that information does not  
20 come out. So, not so concerned if it comes out in the sentencing  
21 portion. And, you know, the government has listed over 100 witnesses  
22 for its merits. In the witness list, there are 12 people from the  
23 Department of State for merits, two OCA's and two people from the FBI

1 and then multiple people from other agencies which we will determine  
2 whether or not and to what extent they are going to be talking about  
3 the charged information. I am assuming that in some way, shape, or  
4 form, they are. But, these individuals are going to get up and they  
5 are going to testify--and, the government wants to do this in kind of  
6 a almost vacuum-like standard where they get up and say, "Let me  
7 describe information for you. Let me explain what these documents  
8 are. Let me tell you about why they are closely held and what their  
9 classification is and then let's just stop the conversation at that  
10 point." Well, that ignores the fact that when they talk about, what  
11 is closely held in the classification, the classification says,  
12 "look, it is classified at this level, it could cause damage. If it  
13 is classified at this level, it could cause serious damage or harm--  
14 or extremely grave damage." So, their classification person is going  
15 to get up there and make that determination. "I believe this could  
16 cause damage." Now, when they are testifying to that--now, this is  
17 separate and apart from the elements, but you would expect the  
18 government has to then offer some evidence that really could, apart  
19 from the classification determination, but even assuming they do not,  
20 then this goes back to our other arguments. This is relevant  
21 impeachment at that point. If the individual gets up and says, "This  
22 could cause damage." Well, okay, that is your statement as a  
23 government witness; a representative of the government right now. I

1 want to show another prior inconsistent statement by the government  
2 which is an admission by a party opponent which says it couldn't  
3 cause damage.

4 MJ: Well, that is not the statement of the witness. How are  
5 you, evidentiary, going to get that in? Well, so, you are looking at  
6 the government as some big monolith?

7 CDC[MR. COOMBS]: That would probably--the government can be an  
8 admission--just very much like for the defense, the accused does not  
9 have to say a statement, his attorney can make a statement or an  
10 agent for the accused can make a statement. So, the issue here would  
11 be any agent of the government who, and the case law bears out, who  
12 is authorized to make that statement. That is an admission by the  
13 government. So, the defense's position is, yes, even if, you know,  
14 it is not the person, like the OCA. Let's say from the State  
15 Department, they do not bring the OCA, instead they bring, you know,  
16 Ambassador "so-and-so" and Ambassador "so-and-so" gets up and he  
17 says, or she says, "You know what, this caused grave damage because  
18 it really impacted our ability to conduct diplomacy with country  
19 'Y'." Well, if the Department of State damage----

20 MJ: Well, that is actual damage then.

21 CDC[MR. COOMBS]: That is actual damage. Or, if they say, "This  
22 could cause," and that might be where the government will try to  
23 parse this. "This could impact our ability." Or, "This information

1 is classified because it could impact ongoing diplomatic efforts."

2 Well, when they make that statement and are talking about the charged

3 diplomatic cables, at that point, when you look at the Department of

4 State damage assessment, which is a damage assessment by the

5 Department of State, by an individual authorized to make that

6 statement, and--or, you look at any other statement, for that matter,

7 by the Department of State, by an agent that is authorized to make

8 the statement, that is a prior inconsistent statement which the

9 defense should be allowed to impeach that witness with. So, if they

10 say, "This could not" or, "We believe this might be information that

11 could cause damage." And, there is a prior inconsistent statement

12 that says it did not cause damage----

13 MJ: How--I guess I am getting confused again. The statement by

14 the OCA, the relevant period would be whether it could cause damage

15 on the date of release. So, the subsequent statement would not be a

16 prior statement. Whether the witness believes today it could cause

17 damage is irrelevant.

18 CDC[MR. COOMBS]: No. So, if the witness here--if the witness

19 gets up and says, "I believe that this could cause damage, it was

20 classified----

21 MJ: "I believed on "X" date it could cause damage."

1           CDC[MR. COOMBS]: Sure. Well, the witness--okay, fine, if the  
2 witness says, "I believed on "X" date this could cause damage," and--  
3 --

4           MJ: And, I do not mean to cut you off. Are you saying that if  
5 they believe today could cause damage that that would be relevant on  
6 the merits?

7           CDC[MR. COOMBS]: It depends on the witness' testimony. The  
8 defense would say under *Diaz* they have to offer some evidence that  
9 this could cause damage as opposed to the classification. So, when  
10 they get up and they start to espouse the reasons why this could  
11 cause damage, that is going to be their current, today, belief that  
12 they are testifying to.

13          MJ: Well, they would be testifying that the evidence could  
14 cause damage on the date of release, right?

15          CDC[MR. COOMBS]: Well, again, it depends on how--what they  
16 actually said.

17          MJ: Well I mean, if it could cause damage after the release,  
18 how would that be relevant to the offenses. I guess where I am--if  
19 the government tried to do that.

20          CDC[MR. COOMBS]: Well, it would be relevant if the government  
21 was saying, "Look, we charged this could cause damage and as proof of  
22 that, we are going to showed that it did." That would be some  
23 evidence to show that it could. In fact, it would be probably pretty

1   persuasive to most people if they said, you know, "Could this cause  
2   damage?" Everyone has an opinion. The OCA's is binding as far as an  
3   opinion, but people can differ with the OCA's opinion. And, that is  
4   with the *Diaz* and *Morison* case support, that that opinion is just an  
5   opinion. So, you have to offer some evidence to show that it could  
6   cause damage. So, if, in fact, they then state whatever that is,  
7   that it could cause damage, we should be entitled to impeach that  
8   with, that it did not. If the government wanted to offer actual  
9   damage to show that it could, that would be relevant. And, you go  
10   down through the assault with the means likely cases, and that is  
11   exactly what the Court is looking at, what actually happened.

12           MJ: Is there any case involving any of the charged offenses  
13   that has addressed this issue?

14           CDC[MR. COOMBS]: Well, I don't believe so because I do not  
15   believe there is any case in which the government has attempted to  
16   avoid having what actually happened be brought out on the merits.  
17   And, there has been no case that the defense has found where this  
18   type of argument has been successfully done to where it has been  
19   reviewed on appeal. The *Drake* case is the closest example of this  
20   where the government tried to limit, to a great extent, the  
21   impeachment of any witnesses. It was not entirely on point here but  
22   that is the one aspect of this that the Court should not, you know,  
23   fail to acknowledge. There is no case of the government is citing to

1 say, "Here is the opinion that says what actually happened, the  
2 actual damage is not relevant in a 793 case." And, the reason why--  
3 we would argue that *Diaz* and *Morison* actually support the opposite  
4 position. You have to offer some evidence to show that it could  
5 cause damage. That, "some evidence", can be what actually happened.  
6 And so conversely, it should be also, if we are trying to show that  
7 it couldn't cause damage, we should be able to offer what actually  
8 happened. We also believe that this would be relevant under 608(c)  
9 for bias.

10 MJ: How?

11 CDC[MR. COOMBS]: We do not have to go much further than when we  
12 had the Department of State witnesses here earlier. I gave--I asked  
13 questions of the Department of state witnesses in a non-  
14 confrontational, non-leading form just to get information. So, I was  
15 as nice as could be with them. And, if the Court recalls back to the  
16 telephonic witness, that witness made, and took every opportunity to  
17 make a statement that this stuff impacted our mission, impacted how  
18 we did work, even went so far as to say that it put, you know,  
19 various people's lives at risk, persons of interest. And, when I  
20 asked, "Well, have you seen that?" because I would want to see that  
21 report obviously and that is something that we talk about that little  
22 bit later today. I asked the witness, "Well, have you seen the  
23 persons at risk report, where it indicates who the witnesses are?"

1 "No, I have not seen that." "So, you are just guessing that that  
2 might happen?" "Yes." At every opportunity that witness was trying  
3 to convey that this caused damage, or could cause damage, or did  
4 cause damage. And the reason why that would happen, ma'am, is  
5 whether the government brings up here, at the end of the day they are  
6 government representatives of the various agencies. And, when this  
7 information was leaked to WikiLeaks and WikiLeaks started to publish  
8 this information, representatives from each of these organizations,  
9 Admiral Mike Mullen, Secretary of State Hillary Clinton, to a certain  
10 extent Secretary Gates, came forward and espoused how the sky was  
11 falling essentially, how this was the end of the world, how Soldiers  
12 were being put at risk, that WikiLeaks can say whatever they want  
13 about the conduct that they are doing and of the value to society of  
14 knowing what is going on in these deployments, but they are going to  
15 have the blood of some young Soldier on their hands. And then, they  
16 talk about all of the people who were identified in the SIGACTS and  
17 how people who cooperated with us are, at that point, no longer going  
18 to cooperate and they are going to be facing targeted assassination,  
19 talked about the cables doing the same thing, open diplomacy as we  
20 know it is over, no one is going to talk to us anymore. No one is  
21 going to trust us. That was the initial response, a very public  
22 response by the various agencies. Within short order they backed  
23 away from that response. And, we find out again from a public

1 statement from Secretary Gates, no sources and methods were  
2 compromised by the SIGACTS. We find out from Secretary Clinton that,  
3 "Oh, you know, every other country is, in fact, telling us that, 'it  
4 is okay. You should hear what you say about you. And, it is all  
5 right, you know, we are going to continue business as usual.'" And  
6 then you have just the proof in the pudding of just seeing how life  
7 has not ended as we know it due to these leaks. But, each of these  
8 people who are going to be called, whoever the government puts up on  
9 that stand, is going to have a vested interest to espouse the opinion  
10 by whatever agency they are from, their main boss or the previous  
11 boss in the positions that have now been replaced with somebody else.  
12 And so, when they get up there and they are going to have a vested  
13 interest at that point to maximize any potential harm, whether that  
14 be from the "could" standpoint of the moment in time or, if the  
15 government, when we get to--well, we still say in the merits portion  
16 they are going to have this incentive to maximize any potential harm  
17 and minimize any concession of lack of harm or lack of possibility  
18 that it could cause harm. And, because of that very factor under  
19 608(c), the defense should be entitled to then impeach these  
20 witnesses any time they espouse any information on whether or not  
21 this could cause damage with actual proof that it did not cause  
22 damage or actual proof, like for the SIGACTS, if they say, "Well, it  
23 gave away our sources." Well, the damage assessment in this example

1 says no sources and methods were compromised. We should be able to  
2 say, "Well, you just said it gave away sources. That is why  
3 classified. The damage assessment says no sources and methods were  
4 compromised." That should come in not only to impeach them but, as  
5 the defense will argue, that should come in as an admission by a  
6 party opponent. If a Department of State witness gets up and says,  
7 "You know, this led to a strained relationship with country "X" or---  
8 -

9 MJ: Well, they would not be able to do that if I ruled that it  
10 was not admissible because you would be talking about actual damage,  
11 right?

12 CDC[MR. COOMBS]: If you said--yeah, that is correct. If you  
13 said what happened is not relevant at all, then they would be left  
14 with, "This information could cause a strained relationship with  
15 country 'X'." And they would state all the reasons why it could cause  
16 a strained relationship with country "X". All the while, we have got  
17 a document--or, we have other open source documents that are not  
18 classified to indicate that there is no strained relationship with  
19 country "X". And, in fact, their relationship has never been better.  
20 Well, we should be able to bring that out so that when the panel  
21 members are looking at it saying, "Okay, are telling me this stuff  
22 could cause that damage." If the Court limits it to, "You cannot say  
23 what actually happened". Then, let us just go with the easiest two

1   witnesses that would be testifying. Government brings whoever, from  
2   whatever agency to say, "This could cause damage." And if PFC  
3   Manning takes the stand, he gets up and says, "I looked at the  
4   information. I use my knowledge, skill and training. I believe this  
5   couldn't cause damage. I believed it was important to release the  
6   information for whatever reason. More than likely, to educate the  
7   public on an important fact that I thought they needed to know. And,  
8   I did not believe it could cause damage." Now, the panel members are  
9   left with, "Okay, who do we believe." Now, *Diaz* and *Morison* says you  
10   have got to offer something more than just a classification. And  
11   that something more, and the defense's position would be what  
12   actually happened.

13           MJ: But, the element is, in that scenario, is not whether he  
14   believed it would cause damage or not, it was whether he had a reason  
15   to believe it would cause damage or not.

16           CDC[MR. COOMBS]: Right. So, when he says, "I did not believe  
17   it could cause damage. I did not believe I actually had a reason to  
18   believe it could cause damage." And, he would almost be going along  
19   with the *Diaz* type statement of, just because it is classified, does  
20   not mean it could cause damage. So, he is taking the position of,  
21   "Look, I know it was classified." In many respects--and, let's just  
22   use the diplomatic cables; the vast majority of them were  
23   unclassified. So, he says, "I did not believe it could cause

1 damage." The ones that were, were either confidential or secret.  
2 None of them were top secret. So, he looks at the information and  
3 says, "I don't believe this could cause damage." So now, the  
4 government has somebody come--obviously is going to get on the stand  
5 and says just the opposite, I believe this could cause damage. Well,  
6 at that point, then the additional evidence--what additional evidence  
7 could you offer at that point on the issue? What would be relevant  
8 on a 401 standard on this? And, that is where the defense says you  
9 go to the assault with the means likely type cases. Also, even if  
10 you did not go to those cases of showing what did happen being  
11 relevant to what could happen, it also, just from the standpoint of  
12 what is relevant under 401 and the accused's right to present a  
13 viable defense, if the defense is, "it could not cause damage. I  
14 believed it could not cause damage at the time. And, I used my  
15 knowledge, skill, and training to say at that time it could not cause  
16 damage." Then, the best evidence in this instance is what did  
17 happen. And, the fact that the government is trying at every  
18 opportunity to prevent this information from coming out, speaks  
19 volumes. And, we would believe that that point if a panel member did  
20 not have the information of what actually happened then they would be  
21 deciding this based upon incomplete information that is, in fact,  
22 relevant. And, there is no case that has said it is not. So again,  
23 from the standpoint of not only impeaching, from general impeachment,

1 but also 608(c) from bias, but then also just under the relevancy for  
2 the various elements going to the, "wantonly". Whether or not this  
3 did cause damage is relevant to the, "wantonly".

4 MJ: How can it--this is where I am having confusion on the  
5 elements and the defenses. How could something that happened  
6 afterwards have any bearing on his intent at the time? He did not  
7 know it.

8 CDC[MR. COOMBS]: Yeah, the idea that, look, no one could know  
9 what this actually--what actually happened at the time that you did  
10 is therefore we are not going to look at that. That has a logical  
11 hook that you could say, "Yeah, that makes some sense." But, the  
12 issue is not whether or not he knew that at that time. The issues in  
13 this case is, could this information cause damage? His belief, and  
14 everything that factored into that belief, you know, he will  
15 articulate. Much like in the *Diaz* case where the government  
16 articulates over here why the accused should have known; the  
17 training, the experience, how long they had been in. All of those  
18 factors come into play with whether or not the accused reasonably  
19 should have known that the information could cause damage. The  
20 actual damage is still a relevant factor, not in the accused's  
21 ultimate determination; but it is a relevant factor in the panel  
22 members' determination on whether or not this information could cause  
23 damage. Because, again, as the defense sees it, it is going to be

1 whatever information the defense offers for why this could not cause  
2 damage. Why it was not reasonable for him to know that it could  
3 cause damage. And, the government offering whatever evidence it  
4 offers to show that it was reasonable, the panel members, now having  
5 that, can have the added benefit of actually what did happen. And,  
6 it is not the issue of being relevant for PFC Manning's belief, it is  
7 what the panel members will know in order to make a determination on  
8 whether or not the stuff could, in fact, cause damage to the United  
9 States. And, without that requirement, or the ability to show what  
10 actually did happened, then *Diaz* and *Morison* does not really make  
11 much sense. The statement of classification alone does not satisfy.  
12 They do not caveat by saying, "Classification alone does not satisfy  
13 but you can only show what is knowledge prior to the actual release."  
14 They do not do that. It is open to whatever proof that you want to  
15 show. So, with regards to the assault with a means likely, I go back  
16 to that because that is the easier analogy to take it out of the  
17 classified information. If someone is charged with an assault with a  
18 means likely to produce death and the person has a grave injury and  
19 you can show spent months in the hospital, that is pretty good  
20 evidence. And, you would expect that the government would offer that  
21 evidence in the merits portion, what actually happened. Now, it also  
22 is probably pretty good aggravation evidence for sentencing if the  
23 accused is found guilty but that does not mean the government is not

1 going to offer it. And, each of these cases that we cited, the  
2 *Outhier* case, the *Joseph* case and the *Hudson* case, the Court of  
3 Appeals looked at what actually happened in order to educate them on  
4 whether or not--in one case it was provident for the accused to have  
5 plead, and in another, whether or not the finding of guilt could be  
6 sustained. And in both instances the Court used what no one would  
7 ever have known at the time the activity happened, what is going to  
8 happen. The Court did not know that. No one else could possibly  
9 know that. But, they used what actually happened in order to say it  
10 could not happen. So, the *Joseph* case, when he drags his spouse,  
11 throws her against the wall, hits her a few times, no one knows when  
12 she goes to the hospital whether or not she actually has internal  
13 injuries or significant trauma to her body. But, the Court when they  
14 decided that is not with the means likely to produce death; looks at  
15 the fact that she did not acquire any stitches, there were no broken  
16 bones, there is no internal injuries. The *Outhier* case, when the  
17 accused represents himself as somebody who has life--training with  
18 regards to being a master swimmer, a master scuba diver and has the  
19 individual go through a test in a pool when he has none of those  
20 requirements, no one knows what is going to happen at that time. If  
21 the individual drowns, that is--you are probably going to get assault  
22 with the means likely. And, the Court looks at the fact that the  
23 individual goes through the person that was the subject of who the

1 accused was charged with, goes through the entire test perfectly  
2 fine. Only after the fact do they find out that the accused did not  
3 have the training, knowledge, or skills to actually produce--perform  
4 the test. The Court says there, "Even though he plead to it, that,  
5 no, we looked at what actually happened, something we could never  
6 know in order to tell us this could not happen." And then, again, in  
7 the *Joseph* case the Court indicates that this is not a decision for  
8 the judge, this is a decision--unless the judge is the trier of fact,  
9 I guess. This is a decision for the trier of fact, to determine all  
10 of the information that is available and to determine whether or not  
11 this could be with the means likely to produce death or bodily harm.  
12 The defense's position is tracking right along each of these cases.

13 MJ: Isn't there a distinction though between assault with a  
14 means likely, you have got the means likely, you have got your fist,  
15 you're pummeling someone and they get--they are in the hospital. I  
16 understand you would use what happened to them to assess whether the  
17 fists were a means likely. This case though involves--you are  
18 talking about an element at a specific period of time. So, even  
19 though I understand the *Outhier*, and the *Hudson* and those cases using  
20 the follow-on harm to determine whether the means was a means likely  
21 to produce grievous bodily harm, or not. Is there a distinction  
22 between these cases and a determination of whether something is--what  
23 was the actual language they are using here? "With reason to believe

1   that the information could be used to the injury of the United States  
2   or the advantage of any foreign nation." I mean, the reason to  
3   believe, are talking about a matter of a time period here which is  
4   not present in the means likely cases. Or, am I seeing a distinction  
5   that is not there?

6           CDC[MR. COOMBS]: No, I think I understand what the Court is  
7   saying, that the issue is, at the time that the accused, in this case  
8   for classified information, releases the information for the 793.  
9   The issue is could that cause damage at that--did the accused know or  
10   reasonably should have known that it could cause damage at that time?

11          MJ: Yes.

12          CDC[MR. COOMBS]: Yeah, no, I think that the Court, looking at  
13   that and being troubled by that a little bit understands the defense.  
14   I do understand where you are looking at there. I do think, however,  
15   the issue, especially when you look at *Diaz* and *Morison*----

16          MJ: You are talking about the----

17          CDC[MR. COOMBS]:----They do look at the fact, not only would the  
18   accused knew at the time but what he should have known based upon  
19   knowledge, skill, and training and granted that that might lead up to  
20   just at the time that you had the leak, but whether or not it could  
21   cause damage, that added requirement--"it could" has to mean  
22   something. It cannot be too speculative. And, when you start to go  
23   down that hole, I think what actually did happen is relevant then,

1 especially when you are just looking at it from a strict Military  
2 Rule of Evidence or federal rule of evidence standard of what is  
3 relevant. Does the fact that what happened have any tendency to make  
4 it more or less probable, what could have happened at the time of the  
5 leak. And, the defense's submission would be, "Yes, it would." Now,  
6 the panel members can take all of that and that is what I believe the  
7 Joseph case would support, that the panel members can take all of  
8 this information into context and make a determination as to whether  
9 or not they believed at the time information was released could have  
10 caused damage. The after the fact after the fact of, "did it?" is  
11 some evidence. It may be very persuasive evidence on whether or not  
12 it could. And, when you are looking at just strict relevance, the  
13 only way you keep this out is to say is not relevant at all. And,  
14 you know, I would see evidence professors sitting around the table  
15 debating this for a while and enjoying the dynamics of it, but, you  
16 know, the everyday person, if you ask them whether or not this could  
17 cause damage, if I tell you it did, will that impact their opinion?  
18 You probably would say, "Yes, it would." Whether or not this could  
19 cause damage, if I told you it did not, would that impact your  
20 opinion? Yes, it would. And, that factor is why we believe it is  
21 relevant. The government is free to argue that, you know, the  
22 accused is lucky that it did not cause any damage for whatever  
23 reason. But, that should not take away from the fact that at the

1 time of the release, if the accused believed it could not and it was  
2 reasonable that--and he was reasonable in his belief and we know he  
3 was reasonable because it did not, that logical chain is in the  
4 defense's position, relevant and is a viable defense. If the Court  
5 says that chain breaks at not, you know, looking at the accused  
6 believed it couldn't cause damage, he believed he was reasonable, and  
7 we are not going to look at the actual damage to prove that belief is  
8 reasonable, they break the chain there, then that eliminates a viable  
9 defense in the defense's position. We are cut off from that point--  
10 pretty much time at the knees of being able to argue that even though  
11 there might be an OCA up there saying that this information is  
12 classified, it shouldn't have been classified. And, PFC Manning in  
13 his knowledge, skill, and training believed it couldn't cause damage  
14 and his belief was reasonable. And, we know his belief was  
15 reasonable because it did not cause damage. If we are not allowed to  
16 do that last step then, again, the defense would believe that at that  
17 point we are severely limited in our defense.

18 MJ: Mr. Coombs, I would also like you to address M.R.E. 403  
19 concerns. Say I allow you to go down that road. What is--how do I  
20 preclude this from becoming a--from confusing the members that this  
21 trial is about--it is not about actual damage and mitigation. Maybe  
22 there was damage or there was not damage because of mitigation steps  
23 taken or not taken, rather than looking to what is the actual

1 element, whether there was reason to believe on the date of  
2 disclosures.

3       CDC[MR. COOMBS]: I think at that point, and I know from our  
4 previous discussion, the Court does not like to give the members,  
5 "Like, here are the things you can consider when deciding something."  
6 But, if you look at the *Diaz* case, they talk about, "You know, you  
7 can consider the training, the knowledge----

8       MJ: I am not talking about instructions. I am talking the  
9 trial itself.

10       CDC[MR. COOMBS]: No, I know. What I was trying to say is, when  
11 you look at those factors, the 403 aspect of it, whether or not it is  
12 unfairly prejudicial, the standard for 403, as the Court knows, is  
13 whether or not the panel members will decide the case on an improper  
14 basis. Usually, that is an emotional basis, but it is an improper  
15 basis. We believe that through instructions, the Court could tell  
16 the members how this information is relevant. If, in fact, the  
17 evidence plays out that the government does not offer anything on the  
18 actual damage because they still believe that for whatever reason  
19 that that is not persuasive evidence for them, and we offer the  
20 accused believed it could [sic] cause damage at that time and his  
21 knowledge, skill, and training and that it did not in fact cause  
22 damage based upon the damage assessments, the Court could instruct  
23 that that is one factor you could consider in deciding whether or not

1 there was a reason to know that this could cause damage. And, the  
2 panel members at that point but understand that that is one of the  
3 factors they can use in order to determine whether or not this could,  
4 in fact, cause damage to the United States or aid any foreign nation.  
5 I don't believe from a 403 standpoint that that information would  
6 cause the members to decide the case on an improper basis. And, that  
7 is really all that 403 is designed to address, will the members  
8 disregard other information and decide the case is upon the evidence  
9 that we are debating here. I don't believe, certainly not with a  
10 panel, that this is going to cause them to have an emotional response  
11 and decide case on an improper basis. Is going to be a----

12 MJ: Well the improper basis would be whether or not there was  
13 actual damage instead of focusing on the elements.

14 CDC[MR. COOMBS]: Right. Well here, though, the actual damage  
15 would be relevant to whether or not it could cause damage at the  
16 time. And so, by caveating that the panel members of saying, look--  
17 and I am sure that comes in, the government is going to be trying to  
18 say, and probably would offer evidence to say, "Well it did not cause  
19 damage because of our mitigation steps. Or it did not cause damage  
20 just by luck but we still believe that it reasonably could have  
21 caused damage." Well, they will often that evidence and this will be  
22 one of the evidence of evidence that the panel members will decide

1 and factor in to their ultimate decision on whether or not that  
2 element is satisfied.

3 MJ: All right thank you, Mr. Coombs.

4 Major Fein?

5 TC[MAJ FEIN]: Yes, ma'am, ultimately this entire issue would  
6 confuse the trier of fact on the actual issues before them on the  
7 merits on whether the accused had a reason to believe it could cause  
8 injury or not. It would do that for every reason both sides  
9 discussed up to this point just because it is not an element of the  
10 offense--of any of the offenses. Second, what the defense is trying  
11 to, it seems, to argue is that for whatever reason, the decision that  
12 the accused made, which the defense can absolutely proffer or can  
13 elicit testimony from the accused or others, so long as it falls  
14 within the rules of evidence on the merits, that that decision was  
15 proper in determining whether something was classified. But, that  
16 decision was not the accused's. And, that has been previously  
17 briefed and argued at the last session on this motion.

18 MJ: Let me just interrupt you for a second. Maybe I am  
19 misunderstanding what they are telling me, but I thought that the  
20 argument would be, even though it is classified, it is obviously not  
21 something that would cause damage, notwithstanding the fact that the  
22 OCA who can properly classify information has classified it. And,  
23 that is demonstrated by the fact that it did not cause damage.

1           TC[MAJ FEIN]: That is, I think, one of the many things the  
2 defense is saying, Your Honor. But, just to go to that one specific  
3 issue, the reason that argument ultimately has no endpoint, no  
4 conclusion, is because again, the day after damage can occur from the  
5 exact same information, which is why this always keeps on going back  
6 to where it could cause damage. That does not help inform the trier  
7 of fact. It does not help impeach one who testifies about the  
8 closely held nature, it being classified therefore it is closely  
9 held. The Steele case actually has better language than Diaz, but  
10 both cases use this language over and over again. If I may have a  
11 moment, Your Honor. [Pause] So first and foremost, I will start with  
12 Diaz. The defense just spoke on Diaz and the footnote. That exact  
13 same footnote, Your Honor, on page 133, the defense stopped reading  
14 when it talked about, "The injury might ensue", then talked about the  
15 representative from DIA that the government would put on to testify  
16 about the closely held nature, the national defense information, why  
17 it was national defense information above and beyond its mere  
18 classification, all that evidence that the government has the burden  
19 of putting forth before the trier of fact in order to move past 917  
20 and have them ultimately go into deliberations. But, the rest of  
21 that footnote--the rest of the footnote states, "That the  
22 government's conclusions that public release of the information in  
23 question may have been harmful to the United States is credible."

1 Every case that discusses 793 offenses and then, as incorporated in  
2 because of the way it is charged, the 1030, and even Article 104  
3 cases dealing with classified information talk about that it could  
4 cause harm in any regard, including impeachment evidence or  
5 impeachment witnesses or any other evidence. You then go to Steele,  
6 Your Honor. The Court over and over again talks about this concept  
7 in Steele.

8 MJ: Do any of the cases that you are referencing say anything  
9 about whether evidence that harm was caused or was not caused is  
10 relevant or not relevant to whether it could cause?

11 TC[MAJ FEIN]: No, Your Honor. There are no cases directly on  
12 point that talk about actual harm or damage being relevant or not  
13 relevant.

14 MJ: Well----

15 TC[MAJ FEIN]: Directly on point to that issue.

16 MJ: So, what is the Government's position with respect to the  
17 analogy for the, "means likely"?

18 TC[MAJ FEIN]: Yes, ma'am. So, Your Honor, for grievous bodily  
19 harm with means likely, first off there is one major jump that is  
20 occurring that has not been recognized. In order to be charged with  
21 that, you have to have caused the harm or attempted to cause actual  
22 harm; the first element. Then, it is the intent element that you had  
23 intended to cause that harm. So, with the Courts in these cases,

1   Hudson and two others, the Courts talk about--especially, we will  
2   start with *Hudson*, Your Honor, is that in *Hudson*, the accused did  
3   cause physical damage or harm to his spouse. In fact, the Court even  
4   wrote, "In concluding that the evidence was factually insufficient,  
5   we do not intend to minimize the appellant's misconduct or imply it  
6   was appropriate. What he did to his wife was criminal." This was  
7   that they found him guilty of the lesser, not of the greater offense.  
8   So, what they were doing was using the actual damage the accused  
9   caused at the same time of the intent to infer whether he had  
10   intended to cause that harm. So, if he cut, scraped, did more than  
11   simply tap someone in a simple battery, then that harm caused at that  
12   moment in time, at the same time of the *mens rea*, then you can infer  
13   that he had the *mens rea* to commit that crime. What the defense is  
14   asking to do is to say that the act was committed on day one and then  
15   on at a different date unknown to the defense--unknown to the  
16   accused, that somehow put infer for his decision, his *mens rea*, of  
17   what he would have reasonably known at the time, not the effect of  
18   his intent to, you know, use more than his fists, so on and so forth.  
19   So, I think this is a bad analogy. There are no other cases like  
20   these cases in the Espionage Act or Article 104. There is a reason  
21   why we cannot find anything on point, there is a reason we can't find  
22   anything on point, either prosecution or defense. The Espionage Act  
23   in its very nature prevents individuals who have certain information

1 from disclosing it, those people in positions of trust, etc. Once  
2 they are granted access, classified information in this case, once  
3 the transmission occurs, the crime is complete and anything  
4 afterwards is not relevant to that. That is why the government  
5 contends----

6 MJ: Well, the crime is only complete if the element of reason  
7 to believe is proved.

8 TC[MAJ FEIN]: Is proven, absolutely, Your Honor. So, going  
9 back to that, going back to Steele, Diaz and the other line in  
10 Morison, Goren, all of the other line of cases down that line, the  
11 best example is going to be actually with the defense has already  
12 proffered to the Court, is that the government has the burden to--  
13 more than just mere classification, to present evidence to the trier  
14 of fact of all of the different ways that he had a reason to believe  
15 and how the information was national defense information, closely  
16 held. So, OCA, other official, witness, whomever it is, will get up  
17 and testify about that. The classification reviews that are done  
18 prior to trial will help inform the Court in this decision. I think  
19 they are included in the Appellate Exhibit 18, but just to read, this  
20 is unclassified, some examples of what the testimony would look like  
21 is that, "This information was classified because of US government  
22 military plans, weapon systems or operations." That is out of the  
23 executive order. Significant action, event summaries, foreign

1 government information, again, reasons to. And then, the individual  
2 with talk about the specifics, "They might pose a threat to security  
3 of US and coalition forces in Iraq or Afghanistan," and then so on,  
4 and so forth, either in open or closed session. The defense is fully  
5 able to cross-examine each of those witnesses on all of that  
6 information that the government puts forth to the trier of fact on  
7 why it is national defense information and closely held. It being  
8 classified is one factor to be considered. They are fully able to  
9 attack every aspect of that on why it was classified at the time or  
10 why it was closely held national defense information and the trier of  
11 fact makes a decision.

12 MJ: So, what is the Government's position? The defense has  
13 come out and said, "Look, the evidence that you classify something  
14 and you said that it was--there was reason to believe that it would  
15 cause damage to the United States and I want to come and cross-  
16 examine you and say, 'it didn't cause damage to the United States so  
17 does not that impeach your original decision back on the date in  
18 question that it could?'"

19 TC[MAJ FEIN]: No, ma'am. Again, that goes directly to  
20 confusing the trier of fact. Could the defense cross-examine and  
21 impeach the witness and say that we think your decision is incorrect.  
22 We could put that it could not cause damage. They could put up their  
23 own defense expert to say that is ridiculous, fact "X", "Y", and "Z"

1 could never cause damage. That it was not closely held. It was not  
2 national defense information. Absolutely, defense can do that. But,  
3 first, the reason it confuses the panel is because that fact, first  
4 might even be known to the witness, but even if it is, does not go--  
5 is not probative to whether it could cause. Because, even if the day  
6 or the day this question is being asked, it did not, it still does  
7 not mean that tomorrow, it could not. It is based off of whatever  
8 information that the prosecution and defense has up to that point in  
9 time and then it continues. So, I guess ultimately, Your Honor,  
10 again it goes back to confusion of the trier of fact on with the  
11 issues really are in this case. The issue is whether it, "could  
12 cause."

13 MJ: I understand the Government's position that the fact that  
14 has not cause damage today does not mean it could not cause damage  
15 tomorrow. What is the Government's response to the defense argument  
16 that I can impeach saying, "As of today there has not been any  
17 damage."

18 TC[MAJ FEIN]: Well again, Your Honor, it goes back to it is not  
19 relevant to any aspect of what is being offered. That is simply  
20 going to mitigation evidence and then it is the government doing the  
21 reciprocal, the aggravation evidence. Whether damage did or did not  
22 occur, whether a victim of a crime does have lifelong mental health  
23 issues is not relevant to whether they were the victim, it is what

1 happened at the time of the commission of the crime. So again, it  
2 gets to this would be very confusing to parse this out. It would not  
3 be appropriate because it is not relevant, it is not probative to any  
4 fact that an individual would be testifying to based off of the  
5 elements of the crime. It does not inform the reasonableness of the  
6 accused since the accused could not even know the information at the  
7 time he committed it. So, when you look at all of the elements of  
8 each of the offenses it is not probative to any of those. It is  
9 simply there to again, confuse the panel in order to confuse them  
10 enough to not have them focus on exactly what their task will be  
11 which is to take in the evidence on the merits for the elements of  
12 the crime and make a decision--voting decision after that.

13 MJ: All right, thank you.

14 TC[MAJ FEIN]: Yes, ma'am.

15 CDC[MR. COOMBS]: Ma'am, again, the *Hudson* case, I would just  
16 ask the Court to take a look at that case. They did not consider  
17 what the harm was at the very moment that the accused assaulted his  
18 spouse, they look at what happened when the spouse went to the  
19 hospital. So, they were looking at it after the fact. So, it is  
20 wrong to state that they were concerned with, "at that moment". But  
21 then also, just going to the, "reason to believe", prong, even if we  
22 use the government's own definition, proposed definition, under 793  
23 for, "reason to believe", it states that you may consider the nature

1 of the information involved when making a determination on whether or  
2 not the accused knew facts from which he concluded or reasonably  
3 should have concluded that the information could cause damage. So,  
4 considering the nature of the information involved now, means we can  
5 consider what was allegedly put out into the public realm. And, when  
6 you consider the nature of the information involved then the damage  
7 assessment or any other statements by the government regarding the  
8 nature of the information is part of the information that the panel  
9 members can consider when deciding whether or not the accused knew  
10 facts or reasonably should have known facts to make that  
11 determination. So, if let's say the accused did not know that  
12 diplomatic cable "X" would lead to a breakdown in our relationship  
13 with country "Y", did not know that, but we believe that he  
14 reasonably should have known that and the evidence that you would be  
15 using to show that is the actual harm, you could, the government is  
16 saying they want to do that, but that could be something that the  
17 panel members consider in order to determine whether or not the  
18 accused reasonably should have known. So, you look at the nature of  
19 the harm----

20 MJ: Well, what offense talks about whether the--you mean,  
21 should have known, with reason to believe?

22 CDC[MR. COOMBS]: Right. From--he concluded or reasonably  
23 should have concluded that the information could. So, the element of

1    their instruction that even the government proposes for, "reason to  
2    believe", would take into factor--or take into account, factors of  
3    what happened after the fact should he reasonably have known and,  
4    what would you consider there. Even if you take it out of the  
5    classified information aspect, when you use that terminology of,  
6    "reasonably should have known", we take--in many instances we take a  
7    look at what happened or the risk of, you know, what could have  
8    happened in making that determination of whether or not you  
9    reasonably should have known. It is the benefit of hindsight 20/20  
10   in order to determine whether or not you reasonably should have  
11   known.

12       MJ: You are losing me there. I do not follow that.

13       CDC[MR. COOMBS]: The idea that if you say, "The accused  
14   reasonably should have known that this information could cause  
15   damage." One of the factors that the panel members could consider in  
16   deciding whether or not the accused reasonably should have known is  
17   the actual harm from whatever information. That could be one of the  
18   factors they use in order to determine whether or not the accused  
19   reasonably should have concluded that the information could cause  
20   damage.

21       MJ: How is something that happens after the accused is making  
22   this determination relevant? That is where I am struggling.

1           CDC[MR. COOMBS]: Well, again, when you are talking relevant,  
2 legal relevance, or even logical relevance, it is any tendency to  
3 prove a fact in issue more or less probable. So, that legal  
4 relevance in this case then, the only way you would say that what  
5 actually happened is not relevant is to say that that has no tendency  
6 whatsoever to impact on whether or not the accused concluded or  
7 reasonably should have concluded. That is the only way you can  
8 eliminate that information. And, again, like I said, evidence  
9 scholars can sit around and talk about this and in fact, 401 and 403,  
10 relevance--the entire 400 series for that matter, a good evidence  
11 professor can spend a long time confusing their students on that and  
12 I enjoy doing that sometimes myself. But, the issue of 401 in this  
13 instance is not a huge hurdle and any tendency is a very low  
14 standard. And, in this instance, even taking out the legal view of  
15 this, this does have--this does meet the any tendency standard. It  
16 would have some tendency to prove a fact in issue and the issue is,  
17 should the accused--did the accused know or reasonably should have  
18 known. What actually happened has some tendency to impact on that  
19 determination and the panel members are going to have to decide, was  
20 there reason to believe? And, when you look at that, the danger--the  
21 so-called danger of confusing the panel members, the panel members  
22 are pretty sharp, I mean, they are not people we drag off the streets  
23 you know, in many instances, our panel members have PhDs, certainly

1 master degrees, definitely bachelor's degrees. Every one of our  
2 members are going to be college-educated. Many times, we have called  
3 members, kind of the blue ribbon panel. They are intelligent enough  
4 to be able to understand the Court's instructions, to be able to take  
5 this information as one of the factors they can consider in order to  
6 determine whether or not there was a, "reason to believe". By  
7 eliminating this, again the defense's position is, it is a viable  
8 defense. The panel members could say, and choose to say that, "well,  
9 just because it did not cause damage, I still think there was a  
10 reason to believe it could have caused damage." They could come to  
11 that conclusion. Or, they could--when they see that it could not  
12 cause damage and they see the nature of the information and again,  
13 the government likes to say, "Well, tomorrow this could cause  
14 damage." Well, if we were--if today was December of 2010, I think  
15 that statement may have some merit. But, last time I checked, we are  
16 in 2012. And, I think at some point this, "tomorrow this could cause  
17 damage," rings hollow, and I think that they has long passed. And  
18 so, we would argue that the information is, in fact, relevant and  
19 should not be precluded from going into it.

20 MJ: All right, thank you, Mr. Coombs.

21 I am looking at the time now. It is 20 minutes till 4:00  
22 or 1600, and the parties wished to be finished today by 1600, is that  
23 correct?

1           CDC[MR. COOMBS]: That is correct, Your Honor.

2           MJ: Do we have anything further that we need to address before  
3       we recess the Court, it seems like there is not much time to go into  
4       anything else substantively?

5           TC[MAJ FEIN]: May we have a 1-minute in-place recess, Your  
6       Honor, to answer that?

7           MJ: Actually, why don't we do this, let us take a 10-minute  
8       recess and then come back on the record and decide if there is  
9       anything in 10 more minutes that we can accomplish. Is that all  
10      right?

11          CDC[MR. COOMBS]: Yes, Your Honor.

12          TC[MAJ FEIN]: Yes, ma'am.

13          ACC: Court is in recess.

14          **[The Article 39(a) session recessed at 1542, 18 July 2012.]**  
15          **[The Article 39(a) session was called to order at 1553, 18 July**  
16          **2012.]**

17          MJ: This Article 39(a) session is called to order.

18           Let the record reflect that all parties present when the  
19       Court last recessed are again present in Court.

20           Is there anything else that we need to address in the next  
21       eight minutes?

1       TC[MAJ FEIN]: Ma'am, the United States proposes that we at  
2 least discuss the US--or, the United States' filing for the 505(g)(2)  
3 authorization of substitutions for the FBI impact statement.

4       MJ: All right.

5       TC[MAJ FEIN]: The United States does not intend to have an oral  
6 argument.

7       MJ: Let me ask you a question, is the United States going to be  
8 bringing any evidence in on sentencing with respect to impact on law  
9 enforcement?

10      TC[MAJ FEIN]: No, Your Honor. Not on the FBI, excuse me.

11      MJ: Not on FBI?

12      TC[MAJ FEIN]: Not concerning the FBI, correct.

13      MJ: All right. The Government at this point is making its  
14 disclosures under *Brady* and, well, since it is the FBI, argued--well,  
15 if 701(a)(6) applied, it is basically evidence favorable to the  
16 defense, not material to the defense, is that correct?

17      TC[MAJ FEIN]: That is correct, Your Honor.

18      MJ: All right. Is the Government going to be having any  
19 further access to the original of this document afterwards?

20      TC[MAJ FEIN]: Could you rephrase your question?

21      MJ: All right. I guess where I am going with this is, is the  
22 Government going to be using this document in any way or any  
23 information from it in any way?

1 TC[MAJ FEIN]: No, Your Honor.

2 MJ: There is two witnesses who, I believe, the defense said  
3 would be testifying from the FBI. Are they in any way familiar with  
4 this document?

5 TC[MAJ FEIN]: No, Your Honor. Your Honor, this document was  
6 created by the FBI headquarters, not a investigative branch  
7 throughout the country. The FBI agents the United States has put on  
8 the witness list are simply for authentication of evidence purposes.

9 MJ: So, they are not going to be talking about impact or damage  
10 or anything of that nature?

11 TC[MAJ FEIN]: No, Your Honor.

12 MJ: All right. Defense?

13 DC: Your Honor, we would just simply ask the Court consider  
14 Appellate Exhibit 182 when looking at the requested substitution.

15 MJ: All right, and for the record the prosecution disclosure to  
16 the defense, which is a redacted filings of the *ex parte* filing with  
17 the Court under Military Rule of Evidence 505(g)(2) is at Appellate  
18 Exhibit 157. And, for the record, the Court has ordered redacted  
19 filings at--one, at the request of the defense for the defense and  
20 two, so there is a record of what is transpiring here in the Court  
21 that the public will have as well.

22 TC[MAJ FEIN]: And, Your Honor, also just for the record, the  
23 original government filing was Appellate Exhibit 156.

1 MJ: 156.

2 TC[MAJ FEIN]: And, that is a classified filing.

3 MJ: All right, and the Defense response is at Appellate Exhibit

4 182, and you are asking me to consider the criteria that you brought

5 up before, is that correct?

6 CDC[MR. COOMBS]: That is correct, Your Honor.

7 ACC: All right, I will.

8 CDC[MR. COOMBS]: Thank you, Your Honor.

9 MJ: All right, is there anything else we need to address today?

10 TC[MAJ FEIN]: One more admin issue from the government, Your

11 Honor.

12 ATC[CPT MORROW]: Ma'am, I have the copy of the cover sheet for

13 modern federal jury instructions. It was one of the enclosures to

14 government's instructions. You asked for a copy of the cover sheet.

15 MJ: All right, am I going to get the Defense one as well?

16 CDC[MR. COOMBS]: You are, once I get back to my office, Your

17 Honor, I can PDF that stuff.

18 MJ: Okay.

19 ATC[CPT MORROW]: My only question is, what form would you like?

20 I can hand it to the Court reporter and have it marked, I do not know

21 what you would want.

22 ACC: Why don't you just put it on top of the enclosure that it

23 went with in whatever Appellate Exhibit is in?

1 ATC[CPT MORROW]: Yes, ma'am.

2 MJ: And for the record, we will do the same thing with the  
3 defense. The appellate exhibits for instructions that have source  
4 citing's from books, I asked the parties to put the first page of a  
5 couple of pages of the books in there so I know exactly what book it  
6 is coming from. So I think the cleanest way on the record would be  
7 if the parties could just find whatever enclosure it is to the  
8 appellate exhibit at issue and just add that to the front page of the  
9 excerpts you have taken from the book.

10 ATC[CPT MORROW]: Yes, ma'am.

11 CDC[MR. COOMBS]: Yes, Your Honor.

12 MJ: Okay, and if I could have a copy of it as well. All right,  
13 anything else we need to address today?

14 CDC[MR. COOMBS]: No, Your Honor.

15 ATC[CPT MORROW]: No, Your Honor.

16 MJ: All right, Court is in recess.

17 [The Article 39(a) session recessed at 1558, 18 July 2012.]

18 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1005, 19 July  
2 2012.]

3 MJ: This Article 39(a) session is called to order.

4 Trial Counsel, please account for the parties.

5 TC[MAJ FEIN]: Your Honor, all parties present when the Court  
6 last recessed are again present with the following exceptions:  
7 Captain Whyte is absent and Staff Sergeant Foy is absent. Staff  
8 Sergeant Hadaway is present.

9 MJ: All right.

10 [The Court reporter marked AE 219 and returned it to the military  
11 judge.]

12 MJ: The Court is prepared to rule on the lesser included  
13 offense maximum punishments.

14 The parties have presented the Court with their views of  
15 the maximum punishments for Specification 1 of Charge II and for the  
16 lesser included offense theories under clause 1 and 2 of Article 134  
17 for the offenses charged under all three clauses of Article 134,  
18 which are 18 United States Code Section 641; 18 United States Code  
19 Section 793(e); and 18 United States Code Section 1030(a)(1)  
20 offenses. After considering the pleadings, evidence presented, and  
21 argument of counsel, the Court finds and concludes as follows:

1                   Factual findings -- excuse me. The Law: Lesser Included  
2 Offenses -- Offense Maximum Punishment -- Offenses Charged Under  
3 Clauses 1 and 2 of Article 134.

4                   For offense -- 1. For offenses not listed in Part IV of  
5 the *Manual for Courts-Martial*, the maximum punishment depends on  
6 whether or not the offense is included in or closely related to a  
7 listed offense in the MCM. R.C.M. 1003(c)(2)(B)(i) [sic].

8                   2. A clause 1 and 2 offense not included in or closely  
9 related to a listed offense is punishable as authorized by the United  
10 States Code or as authorized by custom of the service. R.C.M.  
11 1003(c)(2)(B)(ii) [sic]. Although there is authority that if an  
12 accused's misconduct cannot be charged under a listed offense that  
13 listed offense cannot be a closely related offense, and that would be  
14 *United States v. Tenney*, 60 M.J. 838, Navy-Marine Court of Criminal  
15 Appeals 2005. There is contrary authority. See *United States v.*  
16 *Sampson*, 1 M.J. 266, Court of Military Appeals 1976; and *United*  
17 *States v. Hopkins*, 55 M.J. 546, Navy-Marine Court of Criminal Appeals  
18 2001, a violation of 18 United States Code 1001(a), charged as a  
19 clause 1 and 2 Article 134, UCMJ, offense as closely related to a  
20 violation of Article 107, UCMJ, for sentencing purposes.

21                   3. Where the clause 1 and 2 specification lists every  
22 element of the act prohibited by the United States Code except the  
23 jurisdictional element, the maximum punishment may be the maximum

1 punishment for the United States Code offense. *United States v.*  
2 *Leonard*, 64 M.J. 381, Court of Appeals for the Armed Forces 2007.

3                  4. Where the clause 1 and 2 offense does not include the  
4 conduct and *mens rea* proscribed by the directly analogous federal  
5 criminal statutes or the offense is comprised of acts that cannot be  
6 criminally charged under the United States Code at all, the offense  
7 is neither directly analogous nor essentially the same as the United  
8 States Code offense. *United States v. Beatty*, 70 M.J. 39, Court of  
9 Appeals for the Armed Forces 2011.

10                5. Clause 1 and 2 offenses not specifically listed in  
11 the MCM that are not closely related to or included in a listed  
12 offense that do not describe acts that are criminal under the United  
13 States Code and where there is no maximum punishment authorized by  
14 custom of the service or punishable as general or simple disorder for  
15 the maximum sentence of 4 months' confinement and forfeiture of two-  
16 thirds pay per month for 4 months. *Beatty*, 70 M.J. at 45.

17                Conclusions of Law:

18                1. Should the offenses charged under 18 United States  
19 Code Section 641, 793(e), 1030(a)(1), and Article 134 be found by the  
20 fact finder to be lesser included offenses under clause 1 and/or 2 of  
21 Article 134 without any additional change to the elements, the  
22 maximum penalty will be:

1                   a. The clause 1 and 2 offenses charged using the  
2 elements of 18 United States Code Section 641 are closely related to  
3 Article 121, UCMJ, larceny of military property of a value in excess  
4 of five hundred dollars for Specifications 4, 6, 8, and 16. The  
5 maximum penalty for that offense is 10 years' confinement, a  
6 dishonorable discharge, and forfeiture of all pay and allowances for  
7 each specification. Specification 12 is closely related to Article  
8 121, UCMJ, larceny of nonmilitary property of a value in excess of  
9 five hundred dollars. The maximum penalty for this offense is 5  
10 years' confinement, a dishonorable discharge, and forfeiture of all  
11 pay and allowances.

12                  b. The clause 1 and 2 offenses charged using the  
13 elements of 18 United States Code Section 793(e); Article 134, UCMJ;  
14 and Article 1030(a)(1); Article 134, UCMJ, are not closely related or  
15 included in any offense listed in Part IV of the MCM. The clause 1  
16 and 2 Article 134 offenses would be directly analogous to the respect  
17 of the United States Code offense per R.C.M. 1003(c)(2)(B)(ii). 18  
18 United States Code Section 793(e) and 1030(a)(1) each carry 10 years  
19 of confinement as a maximum sentence, thus the maximum punishment for  
20 each of the Specifications 2, 3, 5, 7, 9, 10, 11, 13, 14, and 15 of  
21 Charge II is 10 years' confinement, a dishonorable discharge, and  
22 total forfeiture of all pay and allowances.

1                   2. Specification 1 of Charge II is not closely related  
2 to any offense listed in Part IV of the UCMJ nor is it directly  
3 analogous to an offense under the United States Code. Army  
4 Regulation 380-5, dated 29 September 2000, Information Security  
5 Program, does not penalize the conduct as charged in Specification 1  
6 of Charge II as a violation of Article 92, UCMJ; however, it does  
7 establish a custom of the service penalizing disclosures of  
8 classified and sensitive information. Disclosures charged under  
9 Article 92 would carry a maximum punishment of confinement for 2  
10 years, a dishonorable discharge, and a total forfeiture of all pay  
11 and allowances. This will be the maximum punishment for  
12 Specification 1 of Charge II.

13                 3. Should other lesser included offenses be raised by  
14 the evidence, the Court will address the maximum punishment for each  
15 such offense after all of the evidence has been presented.

16                 So ordered this 19th day of July, 2012.

17                 Are there any questions with respect to the ruling?

18                 CDC[MR. COOMBS]: No, Your Honor.

19                 TC[MAJ FEIN]: No, Your Honor.

20                 MJ: All right.

21                 Now on today's agenda, we are going to discuss the motion  
22 to compel discovery of the Department of Defense information filed by  
23 the defense; the motion to compel witnesses for the Article 13 motion

1   that will be litigated at the next Article 39(a) session that we hold  
2   for this case; and any issues that we have with respect to the  
3   Military Rule of Evidence 505(h) notice. After that we will be  
4   taking a lunch recess and then coming back on the record to address  
5   the FBI impact statement and the government's motion to preclude  
6   actual damage.

7                 Now for the record, the parties and I are going to meet  
8   in an R.C.M. 802 conference. I think I've discussed what that is  
9   with you all before. It is a conference where the parties and I  
10   discuss logistics and scheduling issues, and we're going to modify  
11   the case calendar. There have been -- we initially had a case  
12   calendar that was going to have this trial, I believe initially,  
13   beginning in August and that moved to October; and based on the  
14   discovery issues and what has transpired with that, the trial, we  
15   talked about at the last session, would be at this point we're  
16   looking at either November or January/February. We don't want to  
17   have a trial of this nature going on during the Christmas holidays,  
18   and both parties agreed with that; is that correct?

19                 CDC[MR. COOMBS]: Yes, Your Honor.

20                 TC[MAJ FEIN]: Yes, Your Honor.

21                 MJ: Okay. So right now what the parties and I have  
22   definitely finalized is we are leaving the Article 39(a) schedule  
23   with the 27th through 31st of August Article 39(a) schedule ready to

1 go and that will include the Article 13 motion or confinement credit  
2 for illegal pretrial punishment, among other things, and a  
3 26 September Article 39(a). At the last session, we talked about  
4 those mini-Article 39(a) sessions that we're going to put in place in  
5 between the lengthier ones to address any issues that arise, sort of,  
6 mid-session. We're going to do that at 1300, and then the next  
7 Article 39(a) session after that will be the 15th through the 19th of  
8 October and the remainder of the Court calendar will be discussed at  
9 that R.C.M. 802 conference and will be announced at the next session.

10 Does either side desire to add anything to what was  
11 discussed at the R.C.M. 802 conference we just held?

12 CDC[MR. COOMBS]: No, Your Honor.

13 TC[MAJ FEIN]: Just one point of clarification, Your Honor. For  
14 the M.R.E. 505(h) notice, if we could do that on the record after the  
15 extended recess so both parties have time to talk again.

16 MJ: That's fine.

17 All right, I also received a prosecution request for  
18 leave until 17 August 2012 to provide notice and disclosure of  
19 certain documents; has that been marked as an appellate exhibit?

20 TC[MAJ FEIN]: Not yet, Your Honor, but the Court reporter does  
21 have a copy.

22 MJ: Can we have it marked?

1 [The Court reporter marked AE 220 and handed it to the military  
2 judge.]

3 MJ: All right, I'm looking at Appellate Exhibit 220, and,  
4 Major Fein, would you like to tell me what that's about?

5 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, the United States  
6 is requesting leave of the Court until 17 August 2012 to ultimately  
7 do -- to achieve two purposes: (1) is in order to first receive  
8 authorization to disclose certain classified information to the  
9 defense subject to the Court's order on 22 June 2012, a certain  
10 portion of the documents, a total of about 11,000 documents are being  
11 processed as we speak in order to get approval to turn over to the  
12 defense and there's a very small portion, we estimate no more than 10  
13 percent, that require additional approvals, either outside the  
14 Department of Defense or at a higher level in the Department of  
15 Defense, based off its classification or other status. So, first,  
16 the government's requesting leave of the Court for just that smaller  
17 population of documents to allow more time for the appropriate  
18 authorities to approve the disclosure of those to the defense.

19 MJ: So the remainder of the documents are going to be ready  
20 to go on the 3rd of August?

21 TC[MAJ FEIN]: The United States doesn't anticipate any delay of  
22 those remainder of the documents.

23 MJ: And these are documents with respect to Cyber Command?

1           TC[MAJ FEIN]: No, Your Honor. These are the documents that  
2 fall under the Court's order referencing those documents are within  
3 the possession, custody, or control of military authorities. The  
4 reason we have separated Cyber Command is because as of the 22 June  
5 order, Cyber Command was not ever requested by the defense nor had  
6 the prosecution ever searched the files of Cyber Command, but based  
7 off a subsequent filing of the defense and the defense's motion for  
8 clarification from the Court's 22 June order, the defense then  
9 mentions Cyber Command as one of the entities within the military  
10 authorities, so at that point and based off an e-mail back and forth  
11 between the government and the pros -- and the defense, the  
12 government then, well, took on the obligation based under 701(a)(2),  
13 receiving the notice of Cyber Command, to go forth and get those  
14 documents for review. So the government has done that; received the  
15 documents from U.S. Cyber Command on 7 July the government requested,  
16 according to Appellate Exhibit 200, on 3 July and we have been  
17 concurrently reviewing those documents this week, while we're in this  
18 motion's hearing, at night and expect to have that done by tomorrow,  
19 so this request is also to allow more time so we can then go to Cyber  
20 Command and actually start the approval process that we've already  
21 had 3 weeks to work on with the rest of DoD docs.

22           MJ: So you want the delay for the Cyber Command documents as  
23 well as the other documents that you've discussed ----

1 TC[MAJ FEIN]: Yes, Your Honor.

2 MJ: ---- until 17 August.

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: All right, what is the defense position?

5 CDC[MR. COOMBS]: Your Honor, the defense doesn't have any  
6 objection to the government's request, again, based upon what they've  
7 indicated that they've got 3,000 or so documents from Cyber Command  
8 to look at and then a sampling of a few hundred from other agencies.  
9 So if 17 August is what the government needs in order to comply with  
10 the Court's order, the defense has no objection.

11 MJ: All right, then the Court is not going to do a written  
12 order. The Court will grant the prosecution request for leave until  
13 17 August 2012, and again that is before the next Article 39(a)  
14 session that we're going to have in this case, so if there's any  
15 issues with respect to these documents, we can address them at that  
16 time.

17 [The military judge handed AE 220 to the Court reporter.]

18 TC[MAJ FEIN]: Yes, Your Honor.

19 MJ: All right, let's turn now to the motion to compel  
20 discovery for Department of State information. The prosecu -- the  
21 defense -- well, let's see.

22 CDC[MR. COOMBS]: The defense has Appellate Exhibit 202, Your  
23 Honor.

1 MJ: All right, so we have the defense reply as Appellate  
2 Exhibit 202, and the prosecution's supplemental response -- this all  
3 stemmed out of the original defense motion to compel discovery number  
4 2, ----

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 MJ: ---- which was Appellate Exhibit-----

7 CDC[MR. COOMBS]: Oh, I'm sorry, Your Honor. The original would  
8 be Appellate Exhibit 96, Your Honor, ----

9 MJ: All right.

10 CDC[MR. COOMBS]: ---- for the original defense motion to compel  
11 discovery 2.

12 [The Court reporter handed AE 96, AE 192, and AE 202 to the military  
13 judge.]

14 MJ: All right. Well I think we're sort of almost going out  
15 of order here. Why don't we -- it's the government that's saying  
16 that these are cumulative and the defense is moving to compel. Why  
17 don't we have the government lay out their position first, and then  
18 we'll have the defense come up and lay out its position.

19 Go ahead, Major Fein.

20 TC[MAJ FEIN]: Yes, Your Honor.

21 Well first and foremost, Your Honor, the government,  
22 although technically in the chain of the appellate exhibits, the  
23 prosecution was required under the Court's order on 22 June after the

1   United States asked for more time, asked the Court, was to simply go  
2   search the documents, understand what's there, and report back to the  
3   Court and the defense so the defense could file a motion or ask for  
4   the documents, so all the government has done is simply said here's  
5   what exists and why we think it's irrelevant, the motion to compel.  
6   So first and foremost, the government's position is, is that the  
7   defense has yet to articulate why it's relevant and necessary for any  
8   of this information. The Court's previous order did absolutely  
9   explain that information that is material to the preparation can be  
10   relevant and necessary for production for information outside the  
11   possession, custody, or control of military authorities.

12       MJ:     What is the government intending to introduce in its  
13   sentencing case with respect to damage from the disclosures to  
14   foreign relations; anything related to the Department of State?

15       TC[MAJ FEIN]: Your Honor, everything from the Department of  
16   State the government intends to use in its case in aggravation with  
17   the one exception of the personal identifying information of certain  
18   individuals that were placed at risk.

19       MJ:     With respect to the personal identifying information or  
20   ----

21       TC[MAJ FEIN]: The actual identifying information of the  
22   individuals. So John Doe Number 1, the actual John Doe's name.  
23   Other than that type of information, everything at the Department of

1 State that's part of that damage assessment the defense already has  
2 access to we intend to elicit testimony from Department of State  
3 witnesses.

4 MJ: And the Department of State witnesses that are going to  
5 be testifying, are they familiar with this background data that -- or  
6 this information that's at issue with this motion to compel?

7 TC[MAJ FEIN]: Some of it, Your Honor, yes. I mean it would  
8 depend on what the individual is being offered for and it would  
9 depend on the access they had. So, for instance -- well first, if I  
10 may, Your Honor, ----

11 MJ: Yes.

12 TC[MAJ FEIN]: ---- there's eight categories of information.  
13 The majority of the categories of information aren't applica -- well,  
14 about half the categories aren't applicable to sentencing anyways.  
15 What the WikiLeaks Working Group did or didn't do, we've already  
16 heard testimony from Ms. Bitter that it was the Crisis Action Team  
17 for the Secretary of State, very immediate in nature, once they got  
18 past what she qualifies or they qualify as a crisis and then they  
19 moved into sustained operations from a military standpoint, they were  
20 able to then actually explore what occurred and the effect. Well  
21 that then came in these State Department messages or cables that fed  
22 into the draft damage document. So when it comes to damage, yes, but  
23 the inner workings of the WikiLeaks Working Group, well, no. The

1 government doesn't intend to use that because it's not aggravating;  
2 it's not mitigating; it's simply a bunch of rosters and a bunch of  
3 reports that quickly went up to contain the crisis they were dealing  
4 with at the time. Again, the words of Ms. Bitter. So when it comes  
5 to aggravation, anything that would be aggravating or that would be  
6 mitigating that we have to turn over anyways under our *Brady*  
7 obligations, then, yes, we do intend to use that information, but not  
8 everything the defense is asking for falls into those categories,  
9 which is why I started with they have not given a showing of what's  
10 relevant and necessary.

11 MJ: Well if the government is going to bring in this evidence  
12 of damage and this evidence of the State Department and rely on the  
13 information in the damage assessment, wouldn't the underlying data  
14 that came to that damage assessment be relevant and necessary?

15 TC[MAJ FEIN]: Relevant, yes, Your Honor; that's where the  
16 cumulative argument comes in. If there's a State Department cable  
17 that was pushed -- was asked for and came back from embassies that  
18 was used as part of the damage assessment then that would be  
19 cumulative with the damage assessment, to the extent it is, which is  
20 why the government -- the government admits up front it -- a poor  
21 choice of words when it said "likely contributed." It should have  
22 been "to the extent that it contributed" to the damage assessment.  
23 So to the extent it contributed to the damage assessment, it's

1 cumulative; relevant, yes, but not necessary. Now if there's -- if  
2 there's other aggravation evidence out there that wasn't used and  
3 that isn't being elicited from witnesses at the Department of State  
4 that know, it would not be relevant or necessary. If it is  
5 mitigating, the defense is entitled to it already, it's *Brady*  
6 material, as the motion -- or as the filing the government submitted  
7 to the Court even started off as all *Brady* material, whether  
8 cumulative or not, the government intends to start seeking  
9 authorization from the Department of State. In fact, starting next  
10 week I have a meeting, couldn't do it this week because we're up  
11 here, to start working on getting the approval for that information  
12 that was identified as potential *Brady* material; that *Brady* material,  
13 that would include *Giglio* impeachment evidence, would be what would  
14 be used and they're entitled to and should receive; they would get to  
15 cross-examine any government witnesses.

16 So the way, Your Honor, the government wrote its -- the  
17 format that the government wrote its filing to provide the  
18 notification -- Your Honor, may I have a moment?

19 MJ: Yes.

20 [The trial counsel conferred.]

21 TC[MAJ FEIN]: So, Your Honor, for the prosecution's  
22 supplemental response to the defense motion to compel, dated 9 July,  
23 what the prosecution did is outlined to first answer the -- answer

1 the Court in what exists and the prosecution went based off the  
2 Court's order the Department of State produce these documents  
3 pursuant to the Court's order. The prosecutors went and reviewed the  
4 documents so we could report back to the Court and notify the defense  
5 so they then could do a motion to compel discovery based off what's  
6 relevant and necessary.

7 There's the eight categories of information and then what  
8 the prosecution did in its -- to make this more efficient in its  
9 filing is really just grouped everything together. So what you first  
10 have is those documents, that information that predates the draft  
11 damage document; and to the extent that it is cumulative, it should  
12 not be produced. If it's not cumulative and it's -- then it's  
13 possible to be relevant and necessary, we acknowledge, based off the  
14 showing of the defense on why it's relevant and necessary.

15 MJ: Well you say that it's not -- it's cumulative and we're  
16 in the discovery phase right now, not the evidence phase. Would it  
17 not ----

18 TC[MAJ FEIN]: Yes.

19 MJ: ---- be relevant for the defense to look at maybe there's  
20 a distinction between what came up in the cable and what went in the  
21 damage assessment?

22 TC[MAJ FEIN]: It's plausible, ma'am, but I go back to we are in  
23 the discovery phase but this is for documents outside of the

1 possession, custody, or control of military authorities, so the  
2 defense is at least required to make a showing of why it's relevant  
3 and necessary.

4 MJ: Well the government is bringing this evidence of damage  
5 in sentencing, so the defense wants it so I assume -- I'll hear from  
6 them in a few minutes but -- to be able to impeach the witnesses that  
7 come up and say, well, your damage assessment says this is -- this  
8 happened and this cable's inconsistent with that or consistent with  
9 that.

10 TC[MAJ FEIN]: Yes, Your Honor. If it's inconsistent, then  
11 assuming if it's inconsistent and it shows less damage then that  
12 would be *Brady* material, tend to reduce punishment, so they'd be  
13 entitled to that anyways. So, again, what I -- it seems like the  
14 defense did in their actual motion is confused; that our starting  
15 point is if it's *Brady* material, they're getting it, at least from  
16 our perspective they're getting it and we just submit that and are  
17 already working it. So it's only -- we're only talking about  
18 material that is not *Brady*; and also the other protection, of course,  
19 in place would be 914 material. If it's a witness up there and any  
20 statement that they've made or adopted, the defense is going to be  
21 entitled to under 914, the Jencks Act.

22 MJ: Is the government having any expert witnesses on  
23 sentencing?

1 TC[MAJ FEIN]: Yes, Your Honor.

2 MJ: With respect to Department of State information?

3 TC[MAJ FEIN]: Yes, Your Honor.

4 MJ: And what is the government envisioning with respect to  
5 that?

6 TC[MAJ FEIN]: Well, Your Honor, the bases of the opinion can be  
7 discoverable to some extent, so based off once we offer them based  
8 off of case calendars of whenever the witness -- the expert to  
9 testify is identified, then once the -- assuming the defense is going  
10 to be submitting a discovery request with the basis of their opinion  
11 and we'll litigate that, but to some degree some of that material  
12 will be relevant and that material we will be turning over to the  
13 defense proactively, not just waiting for a discovery request; but  
14 the difference here is, is that we're dealing with a lot of  
15 information so what we're trying to be able to do is not just notify  
16 the Court but we're trying to notify the defense, too, so they can  
17 make the specific request of exactly what they want, because right  
18 now it's just everything.

19 MJ: How much is "everything?"

20 TC[MAJ FEIN]: Your Honor, we estimate based off what we've  
21 reviewed to this point that it's more than 5,000 documents that  
22 postdate the -- that postdate the actual draft damage document.  
23 Those documents that predate is probably more than 2,000, and to even

1 sift through that, I mean, again, the government has already gone  
2 through it once and is ready to start looking for the *Brady* material  
3 and following the Court's order, assuming that the Court's going to  
4 apply the same previous order from 22 June to this material, just  
5 trying to save time there and make it more efficient, but at the end  
6 of the day this also has to go through the Department of State  
7 approval process, which goes to the last part of our request about  
8 the timing. So this isn't being offered to the Court as the defense  
9 kind of alludes to as kind of either a threat or to box the Court  
10 into a decision; it's just simply stating the facts. The reason the  
11 prosecution from Day 1 of this case, pre-referral, has said that we  
12 have not received specific enough requests based off also the right  
13 authority is because without that specific request it's -- the  
14 defense is asking for everything or everything within a very large  
15 group. So if that's what the defense is really wanting and they're  
16 making the relevance and necessity argument and the Court rules on  
17 it, roger; prosecution moves out with the Department of State, but  
18 then it's a very large population that we've gone through and saying  
19 this is not relevant information to the extent that we've explained  
20 on this document -- or in this document.

21 MJ: So your argument with these predating the damage  
22 assessment is that they're cumulative.

1       TC[MAJ FEIN]: No, Your Honor; only those documents that are  
2 cumulative, not all of them, because as the Court's already  
3 identified -- and that's not for the *Brady* material. So the first  
4 hurdle, all *Brady* material, regardless if it's cumulative or not, is  
5 going -- we're working to give it to the defense.

6       MJ:     Okay.

7       TC[MAJ FEIN]: So we're only talking about material that is not  
8 *Brady* and that is in the damage assessment; that is cumulative. If  
9 there's material that is not *Brady* and not in the damage assessment,  
10 then it is not cumulative.

11      MJ:     Say that one more time.

12      TC[MAJ FEIN]: Yes, Your Honor. There's a population of  
13 documents. The first tier of an analysis is that if it's *Brady*  
14 material, that's extracted from this, so tier 1 is all *Brady* material  
15 absolutely has to be produced in some form to the defense.

16      MJ:     Okay.

17      TC[MAJ FEIN]: So then we're left with the remaining population.  
18 There is a certain portion, a majority of the portion of that  
19 population that is cumulative with the damage assessment; that  
20 material that is cumulative is obviously our argument would be  
21 cumulative; therefore, it should not be subject to a 703 production  
22 order, because the remainder of the material we're saying it's not  
23 cumulative; we're also not agreeing that it's relevant or necessary

1 and the defense hasn't given a showing of why it's relevant and  
2 necessary.

3 MJ: Well let's go along with the predating material. I guess  
4 I'm ----

5 TC[MAJ FEIN]: Yes, Your Honor.

6 MJ: ---- looking at an analogy to a drug urinalysis test. So  
7 you have a conclusion that he's positive for cocaine. Would that be  
8 similar to the underlying test data not being relevant?

9 TC[MAJ FEIN]: No, Your Honor, because I think there the  
10 underlying test data could be used to impeach the forensic -- the lab  
11 examiner on how they came to the conclusion that the end result was  
12 -- I mean there's a testing process there.

13 MJ: Well do you sort of have the same thing here; you have a  
14 damage assessment where people are taking raw data and transferring  
15 that raw data into a product?

16 TC[MAJ FEIN]: No, Your Honor; the government contends it's  
17 slightly different -- or not slightly, it is different, because  
18 first, with the urinalysis, there's a technical process that goes on;  
19 there's machine testing; there's calibration; there's an entire  
20 process to test a urine sample that ultimately comes to the  
21 conclusion of whether someone's positive or negative. The difference  
22 here is these are simply documents for individuals that are put in  
23 their positions based off of their background or their appointment

1 that make the conclusions on this and submit that to main State.  
2 Main State takes that information and then processes it in, but again  
3 it's a document that feeds another document. There's no technical  
4 analysis that could be challenged by the defense in that document;  
5 and, Your Honor, as you've already said, if it is inconsistent and  
6 favorable to the defense, the government understands is *Brady*  
7 material so they're getting it or should be getting it, excuse me.  
8 So really your only category of information that would bolster,  
9 simply bolster the damage assessment would be the only material that  
10 would be cumulative that they would not be receiving.

11 MJ: All right, so let's go through this one by one. The  
12 written assessments produced by the Chiefs of Mission used to  
13 formulate a portion of the draft damage assessment; cables sent to  
14 and from affected embassies related to the cables released up until  
15 August 2011. So the government's intent, then, would be to give the  
16 defense all *Brady* material but nothing that is aggravating.

17 TC[MAJ FEIN]: It would be *Brady* material and anything that is  
18 cumulative -- wait, give everything that's *Brady* material and not --  
19 and information that is not relevant or necessary would be that  
20 material that is cumulative to the damage assessment.

21 MJ: All right.

22 TC[MAJ FEIN]: So if there is other material, Your Honor, and  
23 based off what the defense does in their showing today, then they

1 could argue it is relevant and necessary and then they're entitled to  
2 it because it's both relevant and necessary, not cumulative.

3 MJ: All right, the situational reports?

4 TC[MAJ FEIN]: The same, Your Honor. These situational reports  
5 were the crisis management conclusion reports that were sent up.  
6 This information for the most part is cumulative with the damage  
7 assessments and same argument, Your Honor.

8 MJ: All right, same for the written minutes and agendas of  
9 the meetings of the Mitigation Team?

10 TC[MAJ FEIN]: No, Your Honor; that -- well, initially, yes, for  
11 the portion that goes up to and including the actual -- I'm sorry.  
12 May I unwind that a little bit, Your Honor? The Mitigation Team  
13 minutes and agenda of their meetings occurred pre and post the damage  
14 -- the draft damage assessments. So as we wrote in our filing for  
15 the information that predated the Department of State damage  
16 assessment, that information to the extent it's cumulative is not --  
17 should not be subject to the Court's order. The government contends  
18 that none of that information -- well, it's conceivable, I guess, it  
19 could contain *Brady* material, but we have not seen necessarily the  
20 *Brady* material because the mitigation is how the Department is going  
21 to fix or prevent in the future not what did happen or the extent of  
22 the damage.

1 MJ: All right, what about the information memoranda for the  
2 Department of State produced by WPAR?

3 TC[MAJ FEIN]: Yes, ma'am. WPAR is WikiLeaks Persons at Risk  
4 Working Group information memoranda; the majority of that, again, if  
5 it predates the draft damage assessment is already included. There's  
6 a section in there that discusses this and most of that -- or to the  
7 extent it is cumulative, that information should not be produced for  
8 the information that predates the draft damage document.

9 MJ: All right, when you say "cumulative," let's just take one  
10 of these categories; talk to me about a damage assessment. That's a  
11 conclusion that is reached based on this raw data; is that right?

12 TC[MAJ FEIN]: Well, Your Honor, it's -- yes, but the raw data  
13 is also a conclusion. This isn't a technical process, so it's not --  
14 it's a report that comes from the field that sends up their  
15 conclusions. The conclusions are compiled and then they are put into  
16 a master report. So when I -- when the government says "cumulative,"  
17 it is simply if Country -- if Embassy X says that no damage occurred  
18 and the damage report says no damage occurred in Country X, that  
19 would be cumulative or vice versa, if damage did occur.

20 MJ: So when you're saying "cumulative," you're saying that  
21 these documents say the same thing.

22 TC[MAJ FEIN]: Yes, Your Honor.

23 MJ: In exactly the same way.

1           TC[MAJ FEIN]: Yes, Your Honor, or ----

2           MJ: Because you've got 5 -- how many documents did you tell

3       me, 5,000?

4           TC[MAJ FEIN]: Well that's the total population, Your Honor.

5           MJ: Okay.

6           TC[MAJ FEIN]: The cumulative argument is only for those that

7       predate the draft damage document.

8           MJ: And we're talking there approximately ----

9           TC[MAJ FEIN]: And once you take out all the *Brady* material

10       also.

11          MJ: Yes. So we're talking approximately how many documents

12       then?

13          TC[MAJ FEIN]: I couldn't even estimate, Your Honor, but we did

14       estimate over 2,000 that predate and over 5,000 that postdate, so the

15       max would be a little over 2,000, and then once you take out any

16       *Brady* material it's probably some less than 2,000 is a guess.

17          MJ: Okay.

18           All right, and what about the matrices?

19          TC[MAJ FEIN]: Your Honor, the matrices really should -- kind of

20       the 4, 5, and 6 -- or, excuse me, those aren't the numbers you like,

21       but the next three categories that deals with WPAR ----

22          MJ: 5, 6, and 7.

1           TC[MAJ FEIN]: Yes, Your Honor. Those essentially have to be  
2 grouped all under the same grouping because it all deals with the  
3 WikiLeaks Persons at Risk Working Group. The actual matrices, now  
4 these are the documents that contain this PII. The government does  
5 not contend that the matrices in total are not relevant; it's only  
6 the PII information. The ones that predate the draft document have  
7 been incorporated in, as I mentioned before; that type of information  
8 has been summarized and incorporated into the document, so we would  
9 argue it is cumulative with the exception of the PII that has never  
10 been used anywhere within the Department of State to protect the  
11 individuals. And, again, the United States is arguing it's the very  
12 specific PII; it's not even the background information; it's not that  
13 the person comes from this country; it's not that this could be the  
14 effect; it's who it is and if someone could identify who it is.

15           MJ: So you want to use a pseudonym?

16           TC[MAJ FEIN]: That would be an option, Your Honor. Really we  
17 just probably would just -- we argue it's not relevant who it was;  
18 it's relevant, you know, the effect that it had, so if the expert who  
19 takes the stand is only going to talk about the effect and give  
20 examples and isn't going to give examples of the individuals' names  
21 because that would be -- well, we'd be putting ----

22           MJ: So this matrix ----

23           TC[MAJ FEIN]: ---- the person at risk.

1 MJ: ---- that says, okay, there's John Doe Number 1 in  
2 Country X; John Doe Number 2 in Country Y; John Doe Number 3 in  
3 Country Z, is that incorporated in the damage assessment itself? I  
4 mean, ----

5 TC[MAJ FEIN]: Not by name, ----

6 MJ: ---- do they say exactly ----

7 TC[MAJ FEIN]: ---- Your Honor.

8 MJ: ---- the same thing?

9 TC[MAJ FEIN]: No, it does not, Your Honor.

10 MJ: What does the damage ----

11 TC[MAJ FEIN]: That is a summary.

12 MJ: Okay. All right, go ahead.

13 TC[MAJ FEIN]: So, again, to the extent it is not cumulative.

14 So, Your Honor, the formal guidance, again, that one, it's the same  
15 argument.

16 MJ: Okay.

17 TC[MAJ FEIN]: That guidance is in the draft damage assessment,  
18 not necessarily verbatim but it is summarized; therefore, the  
19 government argues, it's cumulative.

20 MJ: So this is the guidance that went to the embassies; is  
21 that what you're talking about?

22 TC[MAJ FEIN]: Yes, Your Honor, ----

23 MJ: Okay.

1       TC[MAJ FEIN]: ---- in order to say what qualifies as a person  
2 at risk.

3       MJ: And that's in the damage assessment.

4       TC[MAJ FEIN]: Yes, Your Honor, a summary is.

5       MJ: Okay, Number 7?

6       TC[MAJ FEIN]: Your Honor, your Number 7 is that -- well, Your  
7 Honor, I'm sorry.

8       MJ: The open source articles, information collected by the  
9 director.

10      TC[MAJ FEIN]: Yes, ma'am.

11           So, Your Honor, for Number 7, again, it's the same  
12 argument is that any information that was collected prior to the  
13 damage assessment, and this is the office that wrote the damage  
14 assessment. We heard that from Ms. Brown, as the supervisor. This  
15 was the individual and the office that compiled the damage assessment  
16 for the Department, so any information that predates it he received  
17 and -- or the office did, it's in their files, was used -- to the  
18 extent it was used in the damage assessment it would be cumulative.  
19 The *Brady* materials would be searched and worked to turn over, so  
20 we're only talking about that portion that was used that's not *Brady*  
21 would be cumulative to the draft damage assessment. Now post the  
22 damage assessment, that would not be the case, so there would be --  
23 there would not be a cumulative argument; however, as the government

1 has explained in its motion, particularly in this part, there's a lot  
2 of information. This is actually where the majority of this over  
3 5,000 documents are, fall into this category. What we tried to do is  
4 provide the defense and the Court an explanation of where -- of what  
5 type of information there so if they are asking or making argument of  
6 what's relevant and necessary, they can either ask for all --  
7 continue asking for all or at least hone in what they really want.  
8 So, for instance, open source articles that defense also has access  
9 to if that's what they want to argue, then, of course, defense is  
10 going to make that argument and the Court will consider that but that  
11 is a population of documents and then the rest that have been listed  
12 in the government's filing.

13 MJ: Talk to me about administrative records. What are we  
14 talking about?

15 TC[MAJ FEIN]: Yes, Your Honor. Administrative records, we're  
16 talking about, first and foremost, this really came up in the  
17 Mitigation Team documents. These would be records, such as roll  
18 calls, routing documents; documents that have no substantive value.  
19 The United States does acknowledge that some administrative documents  
20 could have substantive information in them; that's why we're very  
21 specific in saying administrative document with no substantive  
22 information. So, again, roll call, even meeting agendas; a meeting  
23 agenda that has nothing relevant to this case would be purely

1 administrative. Another example would be scheduling documents;  
2 e-mails or documents that say, "Are you free at this time for this  
3 meeting?" "No." There's a significant amount of those -- that type  
4 of information. So the United States defines "substantive" as being  
5 any category the Court has already ruled on that would not contain  
6 information dealing with mitigation itself efforts, damage  
7 assessment, or investigation.

8 MJ: All right. Now what about information subsequent to the  
9 damage assessment; what are we talking about there?

10 TC[MAJ FEIN]: I'm sorry. Where are you looking, ma'am?

11 MJ: Information after the damage assessment; what's ----

12 TC[MAJ FEIN]: So in any of these categories that could exist,  
13 Your Honor. Or I'm sorry. Are you talking about a specific  
14 category?

15 MJ: So are you asking -- are you -- is the government  
16 intending only to disclose the *Brady* pieces of that information?

17 TC[MAJ FEIN]: Well the government is required to do the *Brady*  
18 material ----

19 MJ: I understand that.

20 TC[MAJ FEIN]: ---- and so the government contends that based  
21 off the argument of the relevance and necessity of that, then we'll  
22 see today what would need to be disclosed or not.

23 MJ: Okay. And ----

1       TC[MAJ FEIN]: I mean, if it's going to be used at trial,  
2 absolutely, Your Honor, it's going to be produced to defense.

3       MJ: Now you've asked for 45 to 60 days and that is -- is that  
4 for the *Brady* or is that for if I order all of it -- or a portion of  
5 it disclosed under the relevance and necessity standard?

6       TC[MAJ FEIN]: Your Honor, the government would have to probably  
7 get back to the Court after the ruling on that only because these  
8 documents are commingled, although they've been already identified so  
9 we don't have to do this again with the Department of State for  
10 efficiency purposes. We don't think it will take as long, because,  
11 of course, more documents, more time for the *Brady* documents, so it  
12 will be less time, but how many days, probably around the same amount  
13 of time.

14       MJ: So wait a minute. So are -- I'm not sure I'm  
15 understanding you. Are you asking me for 45 to 60 days to review the  
16 *Brady* -- to turn over the *Brady* material or is that if I order  
17 everything -- or a larger portion disclosed?

18       TC[MAJ FEIN]: Your Honor, we're asking for that amount of time  
19 for all of the material.

20       MJ: Now is this ----

21       TC[MAJ FEIN]: For any portion of the -- yes. The *Brady*  
22 material, yes, Your Honor. The *Brady* material and any other portion  
23 that the Court orders.

1 MJ: Okay. Assume I go with the government and I say, "Don't  
2 worry. You don't have to disclose anything other than *Brady*."

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: What time are you asking me for?

5 TC[MAJ FEIN]: The same amount of time, Your Honor.

6 MJ: So it's the same amount of time regardless of the number  
7 of documents?

8 TC[MAJ FEIN]: That's what we're estimating with the Department  
9 of State because it's about setting up the processes to do this with  
10 this amount of information; because even for the *Brady* information,  
11 there likely would be a lot as well.

12 MJ: So sifting through these more than 5,000 documents you  
13 believe a lot of these will be *Brady*.

14 TC[MAJ FEIN]: A portion of them, yes, Your Honor.

15 MJ: Okay.

16 TC[MAJ FEIN]: And, again, when you say "*Brady*," since it's  
17 reducing with no evidence of any exculpatory information, it's still  
18 *Brady* material.

19 MJ: So talk to me about the sentencing. You're going to be  
20 bringing up damage to national security and you're going to have  
21 witnesses. What are they going to be relying on?

22 TC[MAJ FEIN]: Your Honor, a majority of the witnesses will be -  
23 - well, some of the witnesses will be relying on some of these

1 documents. A witness for the WikiLeaks Persons at Risk Working Group  
2 was the chair of the group, so these documents were produced based  
3 off the direction he or she gave, so some of these documents they  
4 won't necessarily be directly relying on but they were produced under  
5 their watch and will contain information that would -- that they  
6 would testify about.

7 MJ: Okay. Anything else?

8 TC[MAJ FEIN]: Your Honor, the only other, I think, category we  
9 didn't go over was Number 8. Number 8 is any prepared written  
10 statement by the Department according to Congress on those two dates.

11 MJ: And you tell me there's none.

12 TC[MAJ FEIN]: Yes, Your Honor. We have gone back and forth  
13 with the Department multiple times. They have confirmed that there  
14 are no written statements, no notes. What was talked about, what  
15 occurred on those two days that was referenced in Ambassador  
16 Kennedy's testimony was simply senior officials talking to staffers.  
17 Those -- these types, we've been informed, are common across the  
18 government, informal conversations; they are not -- there's no  
19 requirement for prepared statements. It's informal discussions.

20 MJ: And defense I think in their motion says, "Did anybody  
21 ask Ambassador Kennedy?"

22 Did anybody ask Ambassador Kennedy?

1       TC[MAJ FEIN]: Your Honor, his office was involved I know in  
2 that. I couldn't say whether Ambassador Kennedy himself was asked,  
3 but he did not actually -- he was not the one who did it and his  
4 office was cleared -- or was part of the clearance process for us to  
5 get this information.

6       MJ:     Okay, because he did testify before Congress; is that  
7 correct?

8       TC[MAJ FEIN]: Yes, Your Honor. He did.

9       MJ:     Now was there a prepared statement that went to Congress?

10      TC[MAJ FEIN]: Yes; that actually was the impetus for this whole  
11 process is the defense did pull that written statement from the  
12 Department of State's Web site so ----

13      MJ:     All right, so you're saying there's no draft documents  
14 that went into that preparation.

15      TC[MAJ FEIN]: No, Your Honor; but, no, this Number 8 is in that  
16 prepared statement on -- 10 March -- 10 March 2011; that prepared  
17 statement references Department of State officials briefing Congress  
18 on 7 and 9 December, so the defense submitted their motion based off  
19 of that information; so the dates 7 and 9 December were referenced by  
20 Ambassador Kennedy in his testimony to Congress, so when the  
21 Department went back and searched their records and their offices,  
22 their equivalent to OCLL, for the 7 and 9 December, they could not  
23 find any prepared statements or any official conversations that

1 members of the Department had with members of Congress. But, again,  
2 it doesn't mean that it didn't happen because members of the  
3 Department talk to members of Congress all the time apparently. This  
4 is common across the executive branch.

5 MJ: All right, but you looked; the Department of State has  
6 found nothing.

7 TC[MAJ FEIN]: Correct, Your Honor.

8 MJ: Okay. Anything else?

9 TC[MAJ FEIN]: No, Your Honor.

10 All right, Defense?

11 CDC[MR. COOMBS]: Your Honor, could we have a brief, 5-minute  
12 comfort break?

13 MJ: Why don't we make it 10.

14 Court is in recess until 11 o'clock.

15 [The Article 39(a) session recessed at 1052, 19 July 2012.]

16 [The Article 39(a) session was called to order at 1101, 19 July  
17 2012.]

18 MJ: This Article 39(a) session is called to order. Let the  
19 record reflect all parties present when the Court last recessed are  
20 again present in Court.

21 Before we proceed, let me just sign the lesser included  
22 offense ruling and give it to the court reporter.

1 [The military judge signed a corrected copy of AE 219 and handed it  
2 to the Court reporter.]

3 MJ: All right, Defense?

4 CDC[MR. COOMBS]: Yes, Your Honor. The government here is  
5 larger -- largely resisting discovery because they believe certain  
6 information is cumulative; anything basically that predates the  
7 damage assessment of August 2011 they're saying is cumulative, and  
8 then they now have, which wasn't really spelled out in their motion,  
9 a second argument for documents that are -- that postdate the damage  
10 assessment we haven't stated that they're relevant and necessary.

11 So I'd like to talk about the predate for a moment. That  
12 apparently, according to Major Fein, is somewhere in the neighborhood  
13 of 2,000 or so pages that they have; and what they'd like to have is  
14 this Court say, well, if it predates the damage assessment, then it's  
15 likely cumulative, or now the way they're stating is for those  
16 documents to the extent that they -- it is cumulative, whatever that  
17 means, so they're using an evidentiary term that the judge may find  
18 and rule in the trial that something is cumulative in order to apply  
19 it to discovery, and just because the item may say something similar  
20 or may capture kind of the same idea doesn't make it cumulative for  
21 discovery. The government doesn't really actually bother to spell  
22 out why it would be cumulative, like give the examples to the Court.  
23 They just simply say, well, it was likely that it was considered in

1       the damage assessment and, therefore, Your Honor, we don't need to  
2       really look at that stuff; that stuff is cumulative. But as the  
3       Court pointed out, you know, you're talking at least now I think,  
4       based upon their argument, 2,000 pages or so. The damage assessment  
5       is less than 50 pages, so working out the math on that, you see, you  
6       know, the government sometimes can be efficient but that would be  
7       pretty good efficiency for the government to distill 2,000 pages into  
8       under 50 pages.

9                   And even the government here today has admitted that the  
10      raw data also has conclusions in it, so it's not just that it's raw  
11      data and then it was put into a conclusion, which the defense would  
12      say we should be able to get to the raw data, but the raw data also  
13      has conclusions in it, according to the government. And the  
14      government says, well, you could get the raw data if you give us a  
15      discovery request, asking for the raw data of the 22 or so -- well  
16      actually 22 witnesses we plan to call, 10 on merits and 12 on  
17      sentencing, if you give us a discovery request for their underlying  
18      data, we'll litigate that position. There's no need to litigate that  
19      position. M.R.E. 705 clearly indicates that on cross-examination an  
20      opponent can disclose the underlying data for an expert's opinion on  
21      cross. 703 discusses revealing the underlying data for your own  
22      witness and when that can come in, but under 705 we can always go

1 into the underlying data, so the government's mistaken that that  
2 information we would have to seek a discovery request for.

3                   But perhaps more troubling is the implication, I think,  
4 of the government's request here, at least for the predate stuff.  
5 They're saying because there's a damage assessment now everything  
6 that predates it was likely considered and, therefore, we don't have  
7 to -- we don't have to look at that stuff unless it's *Brady*, assuming  
8 they understand the correct *Brady* standard, but if that were true,  
9 then any damage assessment by any agency, then, once they did the  
10 damage assessment then they could forever hold off on any of the  
11 other documents that went into that damage assessment.

12           MJ:     Well, Mr. Coombs, how does it help you if it's not *Brady*  
13 material?

14           CDC[MR. COOMBS]: Well, in this instance, it might be helpful  
15 actually to go through a couple of examples, like the formal guidance  
16 or the Chiefs of Mission review. The information if it's not *Brady*  
17 in that it tends to reduce punishment, reduce guilt, or negate guilt,  
18 it still can be material to the preparation of the defense; and under  
19 the Court's own findings and ruling, if it's material to the  
20 preparation of the defense or an agency that's not within the  
21 military's custody or control, it could be relevant and necessary  
22 under 703.

1 MJ: But here's where I'm having my logic trouble. If the  
2 evidence is aggravating, it's contained in the damage assessment, and  
3 it's not favorable to the defense, then how is that helpful to you?

4 CDC[MR. COOMBS]: The evidence is aggravating, it's contained in  
5 the damage assessment, and it's not favorable to the defense?

6 MJ: The conclusion of the aggravation is contained in the  
7 damage assessment.

8 CDC[MR. COOMBS]: Well, the defense's review of the less than  
9 50-page damage assessment is that this is not -- this is a  
10 conclusory-type damage assessment, and in many cases it's a lot of  
11 coulds, so looking at just the chief of mission's review, so let's  
12 say it said, you know, documents from Tunisia could cause damage with  
13 our relations and that's what the damage assessment says, when we  
14 actually look at the firsthand accounting and reports from the chief  
15 of mission for that embassy and he writes in or she writes in, you  
16 know, this could cause here; I don't think this will cause much; and  
17 the extent of it here I think, even though it could, is very, very  
18 minimal and unlikely as you ----

19 MJ: But that's *Brady*.

20 CDC[MR. COOMBS]: It is *Brady*, certainly, but if the --  
21 according to the government, that may also be -- well, again,  
22 depending on how they define *Brady*, that may also be cumulative under

1 their opinion; that it's already information that's captured within  
2 the damage assessment.

3 MJ: Let's go back to my original question.

4 CDC[MR. COOMBS]: Yes.

5 MJ: My original question: Let's assume that that cable says  
6 there was -- there was terrible -- the ambassador of Tunisia was  
7 appalled ----

8 CDC[MR. COOMBS]: Right.

9 MJ: ---- and, you know, is no longer talking to me and that's  
10 in the damage assessment. Why would that raw data be -- how would  
11 that be helpful to the defense?

12 CDC[MR. COOMBS]: Yeah, I think if you had the exact information  
13 from the raw data in the damage assessment, then you may be able to  
14 say, look, it's the identical thing, and that I don't really  
15 understand, then, the opposition to provide it in discovery at that  
16 point, if that were true, but that's never going to be the case and I  
17 would challenge the government to give the Court an example of that,  
18 just given the nature of how many documents we're talking about on  
19 the left-hand side of the equation and a less than 50-page damage  
20 assessment; and if the Court looked at the damage assessment you  
21 would see it's not in any specific detail, like even that. It's a  
22 very generalized document.

1           And we can't forget the government today is getting up,  
2 saying, look; that damage assessment should be, you know, what the  
3 Court says that everything previous to that is cumulative if it's not  
4 Brady, but not that long ago when the government was arguing its  
5 Giles opinion it was saying that this damage assessment is just a  
6 snapshot in time. It represents an interim, you know, view of the  
7 Department of State. It's not the end all/be all of anything. That  
8 was beneficial to their argument when they were trying to say that  
9 the damage assessment was not relevant and necessary for the defense  
10 to have. Now after losing that ruling, they come to the Court  
11 speaking out of the other side of their mouth, saying wait a second.  
12 This interim damage assessment is the document that captured  
13 everything that they thought of up till August of 2011; therefore,  
14 anything prior to that was likely considered in this damage  
15 assessment. You can't have it both ways, and I'm sure once they get  
16 to findings and sentencing, the witnesses will say, well, that's a --  
17 that was an interim report; that was just a snapshot in time. Sure  
18 it might have said that in there but that's not true, or that didn't  
19 capture accurately what we said, and the government now is being the  
20 one that's being trusted to apparently find those documents that  
21 would be material to the preparation of the defense, looking at them  
22 through the eyes of defense counsel to say, hey, I would like to have  
23 this background information in order to know when that witness

1 deviates from what reality is, and so for that reason we would say  
2 that certainly it would be relevant and necessary for us to obtain  
3 the documentation.

4 You look at the fact that they are calling 22 witnesses  
5 to testify, over a quarter of their witness list, and yet they really  
6 want to limit the defense to whatever they said was *Brady* apparently;  
7 then they've got their next category of documents, so Major Fein put  
8 it in tiers. The next category of documents are cumulative with the  
9 damage assessment so that we're not going to get those, and then  
10 apparently a third category is not cumulative but we haven't  
11 articulated at this point why it's relevant and necessary so we're  
12 not going to get those. So it appears under what Major Fein said the  
13 only thing we're going to get is *Brady*. Well these 22 witnesses are  
14 going to get up and testify and apparently we are going to be limited  
15 to a less than 50-page damage assessment that's conclusory in nature,  
16 is not very detailed, and whatever *Brady* documentation that the  
17 government wants to give us; and if previous disclosures are any  
18 indication of what we'd likely get here, it's kind of -- it's going  
19 to probably be heavily redacted documents because they'll say, "Oh,  
20 it's all intermingled," so we'll get a document with the majority of  
21 it blacked out and a line here and a line there and obviously at that  
22 point it becomes a difficult task to even make sense of the document

1 but certainly a very difficult task to then use that document to  
2 challenge any of the 22 witnesses who get up and testify.

3               When you look at the, like the formal guidance that was  
4 put out, Major Fein said that's something that was part of the damage  
5 assessment. Yeah, the statement that we put out formal guidance but  
6 not what the formal guidance was; and unless he doesn't believe that  
7 that would be *Brady*, perhaps, but if the formal guidance provided  
8 insight to the degree of any concern or harm, which it should have  
9 because it was the guidance from the State Department as to what the  
10 Chiefs of Mission should do, well certainly that document if it's not  
11 *Brady* is material to the preparation of the defense and would be  
12 relevant and necessary at that point.

13               The Chiefs of Mission review again, that's their -- the  
14 firsthand review by these individual Chiefs of Mission for the cables  
15 from their respective embassy. There is no detailed accounting in  
16 the damage assessment by embassy. It's by region, for the most part,  
17 and it's, again, in a very conclusory way, depending upon, I guess,  
18 that's also the way the government intends to have its witnesses  
19 testify because the State Department witnesses are -- some of their  
20 witnesses are from regions and would probably come and testify as to  
21 the regional impact. Well the Chiefs of Mission's review, I'm sure  
22 they've put some written product back to the State Department as to,  
23 hey, from our embassy, here are the cables, and you can look at the

1 damage assessments that the defense has received from the government  
2 as probably a good indicator of what these Chiefs of Mission's review  
3 would be like, where like the Department of Homeland Security or  
4 other departments who had done a damage assessment based upon the  
5 cables and they said, "We looked at the 3,000 or so cables," whatever  
6 number it was, "that referenced us; no impact." Well you -- you're  
7 probably going to have something similar to the Chiefs of Mission  
8 where we looked at the, you know, 1500 cables that came from our  
9 embassy; here are the 10 cables that we're concerned about; here are  
10 the other, you know, 1490 cables that we don't believe have any  
11 impact. If the damage assessment actually broke that down and gave  
12 that information, that would be -- they might have an argument, I  
13 guess, but again I don't know why you would oppose giving the  
14 underlying data at that point, but it doesn't have that  
15 documentation. All it says is it could cause damage in that region  
16 and that's probably based upon the very small sampling where they  
17 said there's a possibility. Again, assuming the government  
18 recognizes that that document would be gray then; that the other 1490  
19 didn't, they would have to turn that over. The only way we can be  
20 assured of that, and I'll get to the requested relief, is that  
21 there's a check on the system, on the government's review of these  
22 documents.

1 MJ: So the defense is arguing to me that it's relevant and  
2 necessary to -- for the inculpatory material because the government  
3 may mistake something that's *Brady*.

4 CDC[MR. COOMBS]: The in -- no, this would be exculpatory,  
5 though, but I'm sorry. I want to make sure I understand.

6 MJ: Am I understanding your argument to be that I should  
7 order everything turned over just in case they make a mistake on  
8 *Brady*?

9 CDC[MR. COOMBS]: No, Your Honor, and I'll get to that; that's  
10 not my argument.

11 MJ: Okay.

12 CDC[MR. COOMBS]: So you -- if you look, though, at the  
13 government's positions and the reason why we have doubt as to their  
14 ability to gauge which material is *Brady* and which material would be  
15 relevant and necessary under a this is material to the preparation of  
16 the defense and we should turn it over is the fact of their previous  
17 positions on the State Department documents. They took the *Giles*  
18 position, saying the damage assessment was not relevant and  
19 necessary; so if we trusted the government and how it viewed things,  
20 we would never have seen the damage assessment. Then the government  
21 now says that we haven't established why this stuff should be  
22 relevant and necessary if it's not *Brady*; that they're going to hand  
23 over everything that's *Brady* and then anything that's purely

1 administrative or anything that they don't believe is important  
2 they're not going to hand over. Well they're opposing production of  
3 everything that predates the damage assessment because they believe  
4 that's not relevant and necessary; that position is very similar to  
5 the Giles position and you have to wonder why would you ever take  
6 that position. It seems less -- when we questioned them on the Giles  
7 position and they admitted that it was the State Department that was  
8 pushing that position, then they ultimately owned the position and  
9 said, "Well, it's our position as well." Here again, this opposing  
10 stuff that predates because it's cumulative sounds like that's the  
11 State Department's position as if they're the puppet master saying  
12 oppose this information; that doesn't seem to be a logical argument  
13 to oppose discovery based upon an idea that it's somehow cumulative.

14 The persons at risk, the government has kind of almost a  
15 feeble attempt at avoiding production of the persons at risk  
16 information; and here again I think what they essentially want to do  
17 is have their cake and eat it too. They want to have somebody come  
18 up from the persons at risk category or group and testify about all  
19 the people that were placed at risk and yet give nothing to the  
20 defense to question that, to impeach that testimony. We do have the  
21 benefit of some open source stuff and there are some open source  
22 materials where individuals said they were contacted by the  
23 Department of State because they were identified as a person at risk

1 and they thought that was humorous because their job was to talk to  
2 the State Department representative and their government knew they  
3 were talking to the State Department representative and they were  
4 conveying the opinions that they were required to convey by their  
5 government, so the government's belief that people were placed at  
6 risk and whatever accounting that they have of that should be  
7 suspect, not only because of that but it also should be suspect  
8 because apparently in August of 2011 they did their damage assessment  
9 and then when all the cables were released, every cable released  
10 without redactions, just a few weeks later, they never update the  
11 damage assessment. From the testimony that we received, one person  
12 on his own without really any sort of guidance is pulling open source  
13 stuff to kind of keep track of -- for potential persons at risk but  
14 there's nothing that they were doing, apparently from the three  
15 witnesses who testified, to actually identify persons at risk at that  
16 point, to taking prophylactic measures, to do anything, and yet I'm  
17 sure the person at risk witness is going to get up and testify about  
18 how this was catastrophic; and, of course, if the government has its  
19 way we're going to be limited to a damage assessment and probably  
20 open source material from people who did come forward once they were  
21 identified and said, "You know, hey, I didn't believe I was a person  
22 at risk," and that's going to be the extent of our ability to  
23 undercut the testimony of this witness.

1                   With regards to administrative records, the defense  
2 doesn't understand what the government means really by "the purely  
3 administrative records without any substantive value or that have no  
4 identifiable connection with relevant mitigation evidence," and they  
5 give examples of roll calls, meeting agendas, scheduling documents,  
6 but even purely administrative records, even their examples there,  
7 can be material to the preparation of the defense. If you had a  
8 persons at risk meeting and the documents showed the meeting took 10  
9 minutes and you only had one meeting a month and each meeting was 10  
10 minutes, that may be in the government's view a purely administrative  
11 record but in the defense's view that's a pretty good piece of  
12 information. You thought persons at risk were -- was such an  
13 important category of information to keep on top of that you spent 10  
14 minutes a month talking about it, so that's an example of how a  
15 document that even under the government in their argument of, oh,  
16 this is just purely administrative, how a defense counsel looking at  
17 that same document would say, "No; this is material to the  
18 preparation of the defense. I can use this," and that's how it would  
19 be relevant and necessary.

20                   Ambassador Kennedy's testimony to Congress, the three  
21 witnesses who testified made it seem, at least to the defense, and I  
22 do have the audio so I'll go back through that and supplement if, in  
23 fact, that was the case, but the defense's memory was that Ambassador

1 Kennedy was the person who testified. The government has said we  
2 contacted Ambassador Kennedy's office and Ambassador Kennedy's office  
3 said it wasn't him. They didn't ask him, but apparently they  
4 contacted his office.

5 MJ: Let me stop you there for a minute. I -- did they say it  
6 wasn't Ambassador Kennedy or did they say they don't have any  
7 statements that went into the congressional testimony?

8 TC[MAJ FEIN]: Sir -- excuse me, Your Honor. Ma'am, for those  
9 two dates of what's been requested, there was no testimony; there  
10 were no minutes; there were no prepared statements that went into  
11 whomever it was. They couldn't even identify who it was that talked  
12 to the Depart -- or to Congress on those two dates.

13 MJ: Okay, okay.

14 TC[MAJ FEIN]: So let alone any minutes or -- excuse me, any  
15 statements or any other notes.

16 MJ: Okay.

17 I'm sorry, Mr. Coombs. I just wanted to clarify that in  
18 my mind.

19 CDC[MR. COOMBS]: All right, and it's still confusing for me on  
20 one issue then. You look at Ambassador Kennedy's 10 March testimony  
21 and he talks about how the State Department at the crisis that this  
22 was happening testified and reported to Congress on two separate  
23 occasions to keep them updated and apparently now, according to Major

1 Fein, the State Department cannot identify who talked to Congress;  
2 that's just amazing to me. But, again, I would say -- I would go to  
3 Ambassador Kennedy and say, "Was it you?" and, you know, or "If it  
4 wasn't you, let's find out who it was and do they have any  
5 documentation?" Just saying we can't find it, we can't even -- we  
6 can't even identify who went there is -- I don't even know how to  
7 compartmentalize that in my mind, to tell you the truth, because  
8 there has to be some accounting of who goes to Congress. It's not  
9 like, I guess, based upon the government's representation, this is a  
10 "I'll meet you at Chili's at 6 and we'll talk." This is -- this is  
11 an actual reporting to Congress. Ambassador Kennedy when he reported  
12 to the Senate Committee on Homeland and Government Affairs [sic],  
13 that's just a small grouping of Congress, of the Senate, and he had a  
14 prepared report for that. This is a report to Congress.

15 MJ: Well you're saying on the 7th and the 9th is the report  
16 to Congress.

17 CDC[MR. COOMBS]: And that's from Ambassador Kennedy's testimony  
18 on the 10th, where he says, "We have updated and kept Congress  
19 informed. We gave two briefings to Congress on the 7th and the 9th."  
20 One of our -- and I don't have the attachment, ma'am, but one of our,  
21 I believe it's compel discovery number 2 has a news accounting from  
22 that where one of the aides apparently that was in attendance at that  
23 briefing said, oh, yeah, the State Department came; briefed us. They

1 said, well, the damage really wasn't that significant. We feel  
2 compelled, though, to say that it is significant in order to aid the  
3 Department of Justice in their attempt to do a criminal prosecution  
4 against Julian Assange, so that was in the news account. Of course,  
5 it's unattributed because the person doesn't want to be identified as  
6 the source. The government then gets up and says how can you ever  
7 rely upon that open source stuff; that's, you know, that's  
8 unattributed; that this Court should not be persuaded by that in any  
9 way, shape, or form, so that's where you then say, okay, let's find  
10 out what did you say Department of State? If that representation by  
11 the individual who attended and gave the information to the news  
12 reporter and it was published, if that's inaccurate, well then  
13 certainly you have something where you say, no, we went to the  
14 Department of State on the 7th and 9th and we never said anything  
15 like that.

16 MJ: Well maybe they talked to them. Why is there necessarily  
17 a statement?

18 CDC[MR. COOMBS]: Well because, again, if they say that  
19 Ambassador Kennedy or somebody else just went to Congress and winged  
20 it and said, hey, you know, I'll talk about this thing; ask me any  
21 question you want; that I don't need anything to be -- have any  
22 materials in front of me. I can just talk to you about it. Well,  
23 then they can identify that person to say that's exactly what they

1 did. They just, you know, winged it and spoke off the top of their  
2 head to Congress, but when you're speaking to Congress, I would think  
3 even if it's an everyday or frequent occasion, they're still speaking  
4 to Congress. You're going to prepare statements; and if that's not  
5 true, then once they identify who it is that went there, then that --  
6 I guess that person could say no. We didn't prepare anything, but  
7 then why would there be a prepared statement for Ambassador Kennedy  
8 when he's testifying to a very select group? So it just doesn't make  
9 sense that you wouldn't prepare something for testimony to actual  
10 Congress.

11                   The other troubling aspect of the government's request is  
12 to get 45 to 60 days from this Court in order to determine, I guess  
13 conduct its review if the Court says you're going to have to produce  
14 this stuff, and then determine whether or not they're going to claim  
15 a privilege or propose a substitution.

16                 MJ:     Why is that troubling?

17                 CDC[MR. COOMBS]: It's troubling because the Court gave the  
18 government 30 days to do what it probably should have done in the  
19 first place and that is with an agency that they're getting 22  
20 witnesses from, that they charged documents, they should have done a  
21 Brady review and already had captured this information, but they had  
22 30 days to go through this and at some point they would have -- I  
23 would think it would have crystallized in their mind that they were

1 going to oppose production of some or all of the documentation. Why  
2 not multitask at that point. Why not say to Department of State,  
3 hey, look. If it is truly their opinion and not the Department of  
4 State pushing them into this direction of, hey, look. We are going  
5 to say we're going to just give *Brady*. We're not going to give  
6 anything that's cumulative in our mind to this State Department's  
7 damage assessment and we're not going to give anything else that's  
8 not cumulative, not *Brady* but hasn't been established as relevant and  
9 necessary; that's going to be our position. I'm sure the defense is  
10 going to oppose that and the Court's going to eventually make a  
11 determination. In the event that the Court says we need to produce  
12 this stuff, you guys want to claim your privilege on it. Maybe we've  
13 got 30 days; maybe we could start thinking about that. Do you want  
14 to propose a substitution? Again, they could start thinking about  
15 it.

16 With regards to Cyber Command, that's 3,000 pages and the  
17 government needs apparently just another 2 weeks to knock out 3,000  
18 pages. They've already reviewed all of this and yet regardless of  
19 what the Court orders, whether it's, you know, hand over, you know,  
20 something in excess of the *Brady* or not, it's they're going to need  
21 45 to 60 days, and if you play that out, the defense -- well, if you  
22 take that out on the timeline, we're now in October/November before  
23 we get all discovery. There are a lot of things that have to come

1 into play before then: our witness list, a lot of notices and  
2 disclosures.

3 MJ: All right, Mr. Coombs, I'm going to tell you up front.  
4 If I order this discovery, I'm going to give the government time to  
5 do what they need to do with it, so does the defense still want the  
6 discovery?

7 CDC[MR. COOMBS]: Yes, Your Honor, because ----

8 MJ: Understanding it's going to be -- take some time.

9 CDC[MR. COOMBS]: Yes, Your Honor. And that's the catch-22 that  
10 we would be placed in and we've been placed in before, where it's if  
11 you really want this, it's going to cause delay, ----

12 MJ: That's ----

13 CDC[MR. COOMBS]: ---- but at the end of the day, especially  
14 when my opponent is bringing 22 witnesses from this agency, yes, I  
15 want to have more than a less than 50-page document to battle with  
16 those 22 witnesses, certainly.

17 If the Court, I guess, does give them the 45 or 60 days,  
18 then at that point it should -- the government should be prepared at  
19 that point not only to say privilege or not and substitution or not  
20 but anything that they believe was *Brady*, that should be produced  
21 long in advance unless, again, they're claiming a privilege or they  
22 want to do a substitution; but the documents that the government  
23 believes are not material to the preparation of the defense in that

1 it would be relevant and necessary and should be produced are not  
2 *Brady*, so that subset of documents, however many documents that it is  
3 that the government believes just simply should not be provided, we'd  
4 request that that grouping of documents be provided to the Court as  
5 soon as the government can provide it so that the Court in camera can  
6 look at it to determine whether or not the government is truly  
7 identifying documents that are not *Brady* and truly identifying  
8 documents not material to the preparation of the defense in that it  
9 would be relevant and necessary to produce; that would be the  
10 backstop; that's what I was saying earlier; just some sort of testing  
11 of the government's -- the criteria that the government has used,  
12 much like what the Court is doing with the due diligence.

13 MJ: All right, thank you.

14 Well before you get down, the PII for the persons at  
15 risk, why does the defense need that?

16 CDC[MR. COOMBS]: Well, again, I think this goes -- it depends a  
17 little bit on the witness's testimony. If the witness gets up and  
18 says -- a witness from the State Department -- that we've identified,  
19 you know, 300 people and -- that were placed at risk and we had to  
20 move these people or these people were in serious danger of losing  
21 their life and just talks in the generality about a potential risk to  
22 the person, the defense knows of at least a few people who have

1 publicly come forward and in open source press accounts said, "I was  
2 identified as a person at risk and I think that's laughable."

3 MJ: That's a proffer I have but I don't have any evidence.

4 CDC[MR. COOMBS]: Right, and what we'll do, then, is we'll pull  
5 those articles to produce those to the Court. The defense's position  
6 on this would be this could be much like classified information where  
7 if they identify individuals by name in some documents, in a matrix,  
8 where they've got everyone by name and identify what they've done,  
9 then we can see whether or not it really was a -- there was any  
10 requirement to address a person at risk. It doesn't make sense,  
11 again going back to August 2011, they basically shut the doors on  
12 their damage assessment and one person in the State Department is  
13 randomly keeping track of any sort of open source information to  
14 potentially identify persons at risk; that was the testimony that  
15 we've received, so that is in contradiction to what Major Fein got up  
16 and said, that we're going to have the person who oversaw the persons  
17 at risk group get up and testify and, yeah, she's going to rely upon,  
18 you know, documents, maybe not all the documents, but she's going to  
19 get up and -- or he's going to get up and testify about the people  
20 that were placed at risk. We should be entitled to challenge that,  
21 and I think the best way of doing that is getting their documentation  
22 to where we can see what they did and who they identified. Revealing  
23 that information as to who they identified, obviously if there was,

1   in fact, somebody that is legitimately identified as a person at  
2   risk, then that information should not be revealed outside of us  
3   being able to see it; but if they identify John Smith as the person  
4   at risk and I have an open source document where John Smith went to  
5   the press and said, "You know, it's funny. I was identified as a  
6   person at risk. I think that's humorous," then that would be where I  
7   could undercut their expert from the Department of State when they  
8   get up; so if they've identified, say, 70 people and once I have the  
9   names I can identify 55 of them in open source documents who have  
10   said, "Yeah, I was identified. I think that's hilarious," well then  
11   that would be a way I would ----

12       MJ:     Provide the Court ----

13       CDC[MR. COOMBS]:  ---- impeach them.

14       MJ:     ---- with the open source documents that you're talking  
15   about.

16       CDC[MR. COOMBS]: Yes, Your Honor. You said "provide"?

17       MJ:     Provide me with the open source documents you're talking  
18   about.

19       CDC[MR. COOMBS]: Yes, Your Honor. I will. There's at least  
20   two people who have come forward, who have said, "I was identified as  
21   a person at risk and I think that's humorous."

22       MJ:     All right.

23              Major Fein?

1       TC[MAJ FEIN]: Your Honor, just to clarify for the Court and  
2 possibly the defense some facts. First, for the CYBERCOM filing  
3 earlier, the government said 3,000 pages. For what we're litigating  
4 right now, 2,000 documents and approximately more than 5,000  
5 documents. The reason I'm highlighting that, it's not pages; it's  
6 documents. We average document -- we, for planning purposes, assume  
7 documents range from 3 to 10 pages per document. The reason I'm  
8 emphasizing this, Your Honor, is because the -- a document contains a  
9 lot of information. The information might not even be germane at all  
10 to this case, so that is why this process, 30 to 45 days, takes time  
11 is because the Department, the equity holder, not even the Department  
12 of State wants us to go through them to figure out what is germane  
13 and isn't and then make that decision, so the volume we're talking  
14 about is ----

15       MJ: I've already told the defense if I order discovery I'm  
16 going to give you the time.

17       TC[MAJ FEIN]: Yes, ma'am.

18       MJ: Okay.

19       TC[MAJ FEIN]: Check, ma'am.

20                  Next, Your Honor, again, a point of clarification. The  
21 -- Ms. -- excuse me, Ms. Brown's testimony about the -- his title is  
22 the Director of the Office of Counterintelligence and Consular  
23 Support within the Department wasn't random. It was his job to do

1 this. He is the person for the Department of State in his entire  
2 office; as an office director, that sole job is to track this  
3 information; that's why those 5,000-plus documents exist. So, again,  
4 just for clarity purposes, this isn't random; that's why the  
5 documents are there, housed there.

6 As far as the legal issues here, Your Honor, I've said  
7 this before, and that's why it's a little backwards, is that the  
8 burden is on the defense to establish whether information is relevant  
9 and necessary, even pursuant to the Court's previous order that the  
10 defense had when they wrote their motion. The Court held  
11 specifically when it -- the interplay between what's material  
12 preparation to the defense and relevant and necessary, that the  
13 burden's on the defense for production of evidence outside the  
14 control of military authorities for discovery under relevant and  
15 necessary standard 703(f). Evidence that is material to the  
16 preparation of the defense under the control of government agencies  
17 can be relevant and necessary but they still have to make a showing  
18 of it being relevant and necessary.

19 MJ: Major Fein, what the defense has told me is there's a 50-  
20 some -- a 50-page damage assessment that's conclusory and it's the  
21 underlying data that they want to cross-examine the witnesses that  
22 the government is calling on sentence -- sentencing to present

1 evidence on negative impact to foreign relations, persons at risk, et  
2 cetera, ----

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: ---- so how is that underlying data not material to the  
5 preparation of the defense so they can prepare their cross-  
6 examination?

7 TC[MAJ FEIN]: Well, Your Honor, first and foremost, I think it  
8 could be material to the preparation of the defense, but that data  
9 they're talking about would typically be the *Brady* material and  
10 that's the reason the due process and fair trial rights exist  
11 between, as I'm listing them, *Brady*, *Giglio*, under 701(a)(6); Jencks,  
12 R.C.M. 914; even M.R.E. 705 was spoke about before.

13 MJ: But I know this is a large and complicated case involving  
14 a lot of agencies, but if this was a simple case would you go through  
15 a CID report and just give them the favorable information?

16 TC[MAJ FEIN]: Absolutely not -- well, if it was a simple case,  
17 Your Honor, we would give them the entire file as it sits because  
18 there's no equities and defense has everything; and we would say that  
19 even in this case, you know, the defense -- what is fundamental to  
20 the due process here the defense is going to be getting and that's  
21 what we've been saying from the beginning.

22 MJ: But, for example, I mean look at some of the examples  
23 that the defense gave me.

1           TC[MAJ FEIN]: Yes, ma'am.

2           MJ: Minutes of the Persons at Risk Group; they met once a  
3 month for 10 minutes. Would that be something that the government  
4 would hand over to the defense under *Brady*?

5           TC[MAJ FEIN]: No, Your Honor, it would not be. And that is a  
6 good example, Your Honor; that is the only example the defense gave  
7 today on how -- they articulated how something could be relevant and  
8 necessary.

9           MJ: But, see, that's my circle here, because the government  
10 is looking for *Brady* and that wouldn't occur to you that that's *Brady*  
11 but the defense is articulating -- I mean they can't articulate  
12 everything because they don't know what it is.

13          TC[MAJ FEIN]: Well, yes, ma'am, but they at least have to make  
14 a showing of relevance, and what the defense is doing, you need to  
15 look at their motion. I think they use the term "relevant and  
16 necessary" seven times in their motion to compel discovery, because  
17 they're simply saying because it's material to the preparation of the  
18 defense, it is *de facto* relevant and necessary and they're not even  
19 taking the time to look at what the government has said, here's what  
20 exists, here's the categories of information, and here's how it is  
21 probative to a fact at issue or why it's relevant and why it is  
22 necessary. They're simply going from material to the preparation of  
23 the defense, which, you know, we accept last time and would never

1 argue, the standard for material in preparation is very broad. What  
2 would a defense counsel want in order to even come up with a theory  
3 of their case, maybe it would even go into plea bargaining or any  
4 other process, but that's not the standard for relevant and  
5 necessary. It could feed into why something is relevant and  
6 necessary.

7 MJ: Major Fein, the government is calling Department of State  
8 witnesses to come and testify in sentencing about the aggravation  
9 that this -- these leaks have caused to national security.

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: All of this information is underlying data that can be  
12 used to cross-examine those witnesses.

13 TC[MAJ FEIN]: Well, Your Honor, the government does disagree  
14 with that; not all of the data in all of those eight categories could  
15 be used. The government does not contest whether the State  
16 Department cables that fed into the main State that talks about  
17 damage, absolutely, the damage and formulations to national security,  
18 absolutely, but the minutes or the WikiLeaks Working Group SITREPS  
19 that went up, not necessarily, Your Honor. Those, again, could they  
20 be used, they're already summarized in one document, that was the  
21 cumulative argument, they could be used and the defense already has  
22 access to that information. So, again, it's -- that's where the ----

1 MJ: So the defense has access to that information because  
2 it's in the ----

3 TC[MAJ FEIN]: To the extent it's cumulative, ----

4 MJ: ---- damage assessment.

5 TC[MAJ FEIN]: ---- yes, Your Honor. Again, to the extent it's  
6 cumulative.

7 MJ: Are you telling me that these cable -- these reports say  
8 exactly what's in the damage assessment or is the damage assessment  
9 drawing a conclusory ----

10 TC[MAJ FEIN]: It draws a summarized conclusion, Your Honor.

11 MJ: Then how is it cumulative?

12 TC[MAJ FEIN]: Because it's only to the extent, Your Honor.

13 Again, I understand that we're -- the government's position is very  
14 particular. It's to the extent which would require that the  
15 government and the State Department work together to figure out  
16 exactly what is or is not cumulative. But as I mentioned before,  
17 starting with the page number, it wasn't for the purpose of my -- of  
18 explaining the 2,000/5,000 documents wasn't necessarily a time issue;  
19 it's to focus on that when the order comes down what the government  
20 has maintained from the beginning with the defense is a specific  
21 request so we can work with those departments to get the defense what  
22 they really want.

23 MJ: You already identified the information; is that correct?

1 TC[MAJ FEIN]: Identified the documents, yes, ----

2 MJ: Yes.

3 TC[MAJ FEIN]: ---- Your Honor. Yes, Your Honor. So if a  
4 document is -- it would be -- fall under the Court's order; it's been  
5 identified. It's in a pile; it's been flagged; it's been digitally  
6 flagged; somehow it's been identified.

7 MJ: Wouldn't it be easier for you to just go through and do a  
8 505/506 analysis of those documents than trying to go through and  
9 sift out what may be *Brady* or what may not be?

10 TC[MAJ FEIN]: Your Honor, what might be easier for the  
11 prosecution might not be easier necessarily for the equity holder  
12 that also has to go through. I mean we're -- you know, prosecution,  
13 sure. This prosecution team's full purpose whereas the United States  
14 Government employs to prosecute this case, not contesting that, but  
15 the Department of State still has to conduct ongoing foreign  
16 relations and diplomatic ----

17 MJ: I understand that, but you're also bringing this evidence  
18 on sentencing. If you don't want to disclose it, you don't have to  
19 bring in the evidence on sentencing.

20 TC[MAJ FEIN]: Yes, Your Honor, so ultimately not contesting  
21 that at all, but to answer your question about would it be easier  
22 just to do a 505(g)(2) or even invoke the privilege or a 701(g)  
23 filing for the *in camera* review, it could be, Your Honor, but again,

1 before we even get there, the specific information the defense wants  
2 from the documents is what we're trying to ascertain and that is  
3 articulated through what is relevant and necessary. So the example  
4 they gave earlier is a great example. Yes, minutes because of this  
5 reason would be relevant and necessary, so we want any minutes that  
6 would show -- that deal directly with when the Mitigation Team met  
7 and how long they met for. Okay. Now we understand what we can get  
8 for you and we'll isolate that so we have a much more efficient  
9 process. The alternative here, Your Honor, is, is that everything  
10 that the defense thinks is material to the preparation of the defense  
11 becomes de facto relevant and necessary; therefore, all of it gets  
12 ordered by the Court and all of it has to be reviewed. I guess if  
13 the defense is signing up for that, then we'll go to the Department  
14 of State, but our 30 to 45 days is at least and now we're talking  
15 about a great load of material, so we are ready to execute the  
16 Court's order always and the Department is standing by to execute the  
17 Court's order but all we've maintained from the beginning is if the  
18 defense could use some specificity, choose to under the rule that's  
19 required, then we're put on notice to actually litigate those issues,  
20 like the minutes.

21 MJ: Well, Major Fein, I think the specificity that the  
22 defense has given is there's a damage assessment that is -- that's

1 drawn conclusions and it's based on underlying data; they want the  
2 underlying data.

3 TC[MAJ FEIN]: Yes, ma'am.

4 MJ: And if you're having experts and other witnesses come in  
5 and testify on sentencing on the damage, it's based largely on that  
6 underlying data; isn't that true?

7 TC[MAJ FEIN]: It is, Your Honor. So we'd say except to the  
8 extent it's cumulative if at all, that portion is not necessary --  
9 therefore, not relevant and necessary.

10 MJ: How can 2,000 pages be cumulative with 50 pages?

11 TC[MAJ FEIN]: Well, Your Honor ----

12 MJ: Yeah, I mean, your conclusion is I believe that three  
13 people were put at risk, and then you have the three people who were  
14 identified. Does the prosecution not see that the defense would want  
15 to explore that information to cross-examine the witness that's  
16 testifying there's three people at risk?

17 TC[MAJ FEIN]: Yes, ma'am. I guess from our -- if I may just  
18 back up a little bit. Your first question before you ended there,  
19 Your Honor, was how could 2,000 pages not -- how could 2,000 pages be  
20 cumulative with 50 pages. Going back to 2,000 documents, so you have  
21 one document that might be 1 to 10 pages, that document, that cable  
22 might have other information in it, so the defense is asking for any  
23 information dealing with damage investigation or mitigation efforts.

1 MJ: Yes.

2 TC[MAJ FEIN]: So take one document, we extract the information

3 that could potentially be germane, relevant -- I'm staying away from

4 the "relevant" word, but germane to that request. We review it to

5 see if we would consider relevant, *Brady*, under all the standards, we

6 review it. We're still only talking about one, two paragraphs, maybe

7 even the whole document; it varies every document. So what needs to

8 occur then is once that information that we've ascertained, then the

9 decisions are made of whether that information would be relevant and

10 necessary; it's not the whole document. So it's not 2,000 pages

11 cumulative with -- or 2,000 documents cumulative with 50 pages; it's

12 only the portions that are relevant being cumulative, and that's why

13 the government should have written it's to the extent that it's

14 cumulative. So as the Department goes through and does their review

15 based off the Court's order, they would be saying, okay, this

16 information is that -- the prosecution saying this is what is,

17 according to the Court's order, relevant and necessary, or as we've

18 already done, here's what is *Brady* material. The rest shouldn't

19 apply; then that is the information that we're saying to the extent

20 that information is cumulative, not the *Brady* material, but anything

21 that would be -- what the defense is saying show preparation of the

22 defense, that information is cumulative. That's not 2,000 pages,

23 Your Honor. I think there is between 160 and 200 different

1 diplomatic missions, according to the State Department's Web site, so  
2 if all of them did one cable, if they could have done more, they  
3 could have done less, but if they all did one and they put that  
4 information in it, we're not talking about that much; so to the  
5 extent it is cumulative, that's the government's position.

6 [Pause] May I have a moment, Your Honor?

7 MJ: Yes.

8 [The trial counsel conferred.]

9 TC[MAJ FEIN]: Your Honor, I was weighing the example, [pause] a  
10 certain report, a certain document would -- could be sent back to the  
11 Department of State, and this would be true for other departments as  
12 well, but Department of State and that document simply outlines ten  
13 different issues going on; one of them might be this is the current  
14 status of this one issue. The only reason this issue ever came up  
15 was because of the WikiLeaks disclosure, so that document we're  
16 reviewing, we see it, go through the document, flag it as something  
17 we have to go back to look at, and then that one line, if it was used  
18 in -- if it predates the draft damage assessment and it was used in  
19 the draft damage assessment, that one line would be cumulative. If  
20 they synthesized it and it wasn't the same, it would not be  
21 cumulative.

1 MJ: So are you telling me if it says, you know, the document  
2 says, "There was impact in Tunisia," and the damage assessment says,  
3 "There was impact in Tunisia," that would be cumulative?

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: But if the document says, "The ambassador to Tunisia  
6 talked to the local delegation and there may have been some hard  
7 feelings involved," and then the damage assessment says, "There's  
8 damage in Tunisia," would you consider that cumulative?

9 TC[MAJ FEIN]: Likely not, Your Honor. No.

10 MJ: So I'm not sure what we're -- what's ----

11 TC[MAJ FEIN]: Well because the majority of the information we  
12 review, Your Honor, that stood out to us as being cumulative would be  
13 the one that is essentially the same. I'm not going to tell the  
14 Court today that we would consider only if it's verbatim, word for  
15 word, punctuation and all are the same that that would be the only  
16 criteria of being cumulative, but it would probably be if it's the  
17 same amount of -- because really we're only talking about impact for  
18 damage, or lack thereof. So if it's the same amount of impact, then  
19 it would be cumulative; if there's a variation and it's mitigating,  
20 then that would be *Brady*.

21 MJ: What if it's a variation and it's aggravating?

22 TC[MAJ FEIN]: Then it would not be cumulative, Your Honor.

23 MJ: Would you turn it over?

1           TC[MAJ FEIN]: Well currently, Your Honor, if the defense's  
2 position is that that is relevant and necessary and that's how the  
3 Court orders it, absolutely; and if we intend to use the information  
4 in sentencing, absolutely, Your Honor. See, part of that decision-  
5 making, Your Honor, is the Department of State, I mean, we --  
6 representing the United States Government also here developing our  
7 sentencing case have to decide what aggravating evidence we intend to  
8 use or not. The number one condition on that is if we're going to  
9 use it, defense gets it; that's fundamental. So if the Department of  
10 State said, "No. You're not using that information," then no. We  
11 would not be. If there's information that wasn't used in the draft  
12 damage assessment as of August 2011 but was used afterwards that we  
13 can't elicit from any witnesses because it's too sensitive even in a  
14 classified closed session, then, no, we don't intend to use it and  
15 nor would it be -- nor should it and can it be the basis of an  
16 opinion of an expert witness.

17          MJ: Okay, so I guess that's where I'm still a little confused  
18 at this point. The information that's been collected from the  
19 Department of State by the government, as of right now are there any  
20 limitations on what the government intends to use in aggravation from  
21 the Department of State? I mean, have you carved out categories that  
22 you're not going to use?

1           TC[MAJ FEIN]: First, Your Honor, the prosecution has no  
2 information, physical documents, from the Department of State except  
3 the draft impact statement. We've received no documentation. The  
4 most we've done is sat down and talk, spoken to the witnesses, so  
5 ----

6           MJ: So these 5,000 documents that you're talking about, who  
7 has them?

8           TC[MAJ FEIN]: The Department of State, Your Honor.

9           MJ: And they've separated them so you can review them.

10          TC[MAJ FEIN]: Absolutely, Your Honor. They -- in their  
11 litigation section and -- yes. The prosecutors for tomorrow have to  
12 go and actually review them at the Department of State.

13          MJ: So at this point have you made a determination on what,  
14 if anything, you're going to do with sentencing with the Department  
15 of State?

16          TC[MAJ FEIN]: Yes, Your Honor, based off, as the defense has  
17 pointed out, the witnesses on the witness list we know which  
18 witnesses we're calling. We understand what areas they intend to  
19 testify about. What we still are going to be doing following this  
20 motions hearing, starting next week, is figuring out what basis of  
21 their information because that, of course, is going to be  
22 discoverable.

1 MJ: Are they going to be testifying about -- well, let's go  
2 through each category: Written assessments produced by Chiefs of  
3 Mission used to formulate a portion of the draft assessment.

4 TC[MAJ FEIN]: Yes, Your Honor.

5 MJ: Is that information going to be part of the government's  
6 aggravation case?

7 TC[MAJ FEIN]: It will -- yes, Your Honor. It will be the basis  
8 of opinions.

9 MJ: All right, so then what is the government's objection to  
10 releasing those to the defense?

11 TC[MAJ FEIN]: They would be relevant if we are eliciting the  
12 information. We intend to do it, so it would be relevant and  
13 necessary, Your Honor.

14 MJ: All right, let's go through the written situational  
15 reports produced by the WikiLeaks Working Group.

16 TC[MAJ FEIN]: Your Honor, that information, again, is were  
17 SITREPS sent up? None of the information contained in it would be  
18 used by any -- the problem with that is, Your Honor, is some of the  
19 senior officials probably did review the documents but they don't  
20 provide any information that would be helpful to aggravating or  
21 mitigating circumstances. They are situational reports that were  
22 done instantaneous to disclosures by the press. So if something was  
23 released in the public, a SITREP went up, immediate, and all -- any

1 of that information would have been incorporated -- if we're using  
2 it, it would have been incorporated into the draft damage assessment.

3 MJ: So do you think the frequency of the situational reports  
4 would be something that might be material to the preparation of the  
5 defense; comes out once every 6 months versus situational reports  
6 coming out every day?

7 TC[MAJ FEIN]: No, Your Honor, because what Ms. Bitter  
8 testified, this all came from Ms. Bitter's testimony, is that what  
9 happens with any type of crisis at the Department of State is they  
10 stand up a working group instantly in their command center, so it's  
11 literally the Department of State's talk for this Secretary.

12 MJ: Is anyone in the -- any of the government's -- or any of  
13 the government's witnesses in sentencing going to be talking about  
14 this group?

15 TC[MAJ FEIN]: Not the group, Your Honor, but all the subject  
16 matter that the group covered down on, which was the immediate  
17 impact.

18 MJ: Okay. In the situational reports, wouldn't that be  
19 relating to the impact?

20 TC[MAJ FEIN]: It would be, Your Honor. It could be.

21 MJ: Okay. Let's talk about the minutes and agendas of the  
22 meeting of the Mitigation Group. Is any of the government -- are any

1 of the government's sentencing witnesses going to be talking about  
2 the Mitigation Group?

3 TC[MAJ FEIN]: No, Your Honor, because, again, this isn't the  
4 Mitigation Team. This is -- what the Mitigation Group's purpose, and  
5 that's where, I think, it's unfortunate the term "Mitigation" is  
6 used, because in the criminal law -- criminal justice standard --  
7 perspective, mitigation for sentencing, the Mitigation Team's purpose  
8 was to figure out how to better prepare the Department for future  
9 acts similar to what Private First Class Manning has been charged  
10 with. So they didn't focus on damage; they focused on preventing  
11 future similar damage with someone committing the same acts.

12 MJ: Is the government going to be introducing any evidence of  
13 that mitigation?

14 TC[MAJ FEIN]: No, Your Honor, not of the Mitigation Team.

15 MJ: Is anything about the Mitigation Team in the damage  
16 assessment?

17 TC[MAJ FEIN]: Yes, Your Honor.

18 MJ: So none of the witnesses that you're going to bring in on  
19 sentencing are going to talk about, hey, Department of State, we  
20 formed a team that's going to go -- that's going to look at this in  
21 the future and see how we can prevent these kinds of things?

22 TC[MAJ FEIN]: Not for the government's aggravation case, no,  
23 Your Honor, or on the merits.

1 MJ: Okay, the information memoranda for the Secretary of  
2 State produced by WPAR.

3 TC[MAJ FEIN]: Yes, Your Honor. I think we could probably group  
4 the next three together, since these all deal with the WikiLeaks  
5 Persons at Risk Working Group.

6 MJ: Okay.

7 TC[MAJ FEIN]: Your Honor, may I have a moment?

8 MJ: Yes.

9 [The trial counsel conferred.]

10 TC[MAJ FEIN]: Your Honor, just to clarify when you asked about  
11 the Mitigation Team, the government does not intend to elicit  
12 testimony about the Mitigation Team or the Mitigation Team efforts,  
13 but as my cocounsel pointed out, it is conceivable that a witness  
14 might mention it, so we would, of course, have to admonish our  
15 witnesses, but we would not be eliciting testimony about it at all.  
16 But some of the witnesses, of course, probably participated on it,  
17 along with other duties of what we're eliciting from their testimony.

18 MJ: All right, let's go to 4, 5, and 6.

19 TC[MAJ FEIN]: Yes, ma'am. The WikiLeaks Persons at Risk  
20 Working Group, yes, Your Honor. The government does intend to elicit  
21 testimony about the WikiLeaks Persons at Risk Working Group.

22 MJ: Okay.

1       TC[MAJ FEIN]: But not about the individuals and who they were  
2 by name.

3       MJ: So at this point, at least, the government if I order  
4 this disclosed the government will go and look at 505 and 506 options  
5 with respect to that information; is that correct?

6       TC[MAJ FEIN]: Yes, Your Honor; if ordered to disclose, that  
7 would be the route.

8       MJ: What about 7?

9       TC[MAJ FEIN]: Yes, Your Honor.

10      MJ: Eight?

11      TC[MAJ FEIN]: No.

12      MJ: Because you were saying you don't have any.

13      TC[MAJ FEIN]: Correct, Your Honor.

14      MJ: Okay. And what other information are we talking about?

15      TC[MAJ FEIN]: I'm sorry, Your Honor, in regards ----

16      MJ: So do we have any other categories of information other  
17 than 1 through 8?

18      TC[MAJ FEIN]: Well not based off what the defense originally  
19 submitted, Your Honor. I mean, this essentially covers everything  
20 we've seen at the Department of State anyways. In addition to  
21 searching these records, the prosecution also was doing its original,  
22 concurrently, its *Brady* review of all records that would fit the  
23 criteria of the same memo we've already submitted and this will, of

1 course, be in the due diligence accounting but in the -- the same as  
2 the DIA example we've given the Court and the defense, that same  
3 request went to the Department of State, so we're also looking at  
4 that which is even broader for our *Brady* search.

5 MJ: All right. Anything else?

6 TC[MAJ FEIN]: No, Your Honor.

7 MJ: All right, thank you.

8 Mr. Coombs, anything?

9 CDC[MR. COOMBS]: No, Your Honor. I think you addressed the  
10 issues that we would have.

11 MJ: All right. I notice it's 12 o'clock. We still have the  
12 Article 13 issue, and it's -- that's all we have until we are going  
13 to recess for the lengthy period; is that correct?

14 CDC[MR. COOMBS]: Yes, Your Honor.

15 TC[MAJ FEIN]: Yes, Your Honor.

16 MJ: All right, are the parties prepared to proceed with the  
17 Article 13 issue?

18 CDC[MR. COOMBS]: Yes, Your Honor.

19 TC[MAJ FEIN]: Yes, Your Honor.

20 MJ: Do you want to take a brief recess first or are you good  
21 to go?

22 CDC[MR. COOMBS]: I'm good to go, Your Honor.

23 MJ: All right.

1 TC[MAJ FEIN]: I'm good, too.

2 CDC[MR. COOMBS]: Ma'am, the ----

3 MJ: Well before we do that, the defense requested witnesses  
4 is Appellate Exhibit 181; the defense motion to compel production is  
5 Appellate Exhibit 206; and what is the government's response?

6 TC[MAJ FEIN]: Your Honor, the government's response is marked  
7 as Appellate Exhibit 195. And the original was also Appellate  
8 Exhibit 181.

9 MJ: Thank you.

10 [The Court reporter handed exhibits to the military judge.]

11 MJ: All right, I have Appellate Exhibit 195, which is the  
12 government response to defense witnesses. I have 195. I have 181;  
13 yes, I do. All right, I think I have everything; yes.

14 CDC[MR. COOMBS]: And then just 206, ma'am.

15 MJ: I have it.

16 CDC[MR. COOMBS]: Ma'am, as the Court knows, we'll be filing our  
17 Article 13 motion on the 27th of July, and that will give the Court a  
18 lot more context to what the defense is alleging occurred to my  
19 client and why we allege that it was illegal pretrial punishment  
20 under Article 13. But looking at our witnesses, when we gave the  
21 witness list, it was with the eye of doing this, if there was any  
22 opposition to them, we would hammer that out so the witnesses would  
23 be available at the actual motions hearing on the 27th of August. We

1 listed seven witnesses. When you're talking about over 8 months of  
2 unlawful pretrial punishment under the defense's allegation, seven  
3 witnesses is a very reasonable amount. The government opposed two of  
4 those witnesses, and they said that these witnesses would not be  
5 relevant and necessary under R.C.M. 703, so I'd like to talk about  
6 why they are both relevant.

7 First, Lieutenant Colonel Dawn Hilton, the Commander of  
8 Fort Leavenworth's Joint Regional Correctional Facility. We are not  
9 calling her to second-guess the decisions of the commander at  
10 Quantico, contrary to what the government would say. The reason why  
11 we are calling her is to support the defense's theory and the defense  
12 believes when we are able to have our witnesses testify and the Court  
13 will have the benefit of our motion, you'll see that PFC Manning was  
14 placed in what was called maximum custody and either suicide risk or  
15 prevention of injury status while at Quantico, essentially from  
16 29 July 2010 to 19 April 2011; and for the entire time there he was  
17 in MAX and sometimes he was in suicide risk and sometimes in  
18 prevention of injury, but essentially what that meant was he was  
19 placed in solitary confinement for 23 hours out of the day, and for a  
20 good portion of the time, he was given only 20 minutes of outside  
21 recreation and then it was graciously extended to an hour; and the  
22 defense quickly objected to the manner in which our client was being  
23 held. We did that based upon the statements from the mental health

1 professionals at the brig, who were saying that prevention of injury  
2 status was not required; that he should, in fact, be taken off of  
3 prevention of injury. And so as required, we made an initial  
4 complaint to the brig commander and that went basically nowhere.  
5 We made a 305(g) request to have PFC Manning removed from confinement  
6 based upon a no longer need for him to be placed in pretrial  
7 confinement; that also didn't go anywhere. And we filed an Article  
8 138 complaint that ultimately worked its way up and was proven -- or  
9 actually it was mooted by the fact that PFC Manning was moved to Fort  
10 Leavenworth but eventually the Secretary of the Navy or the Assistant  
11 Secretary of the Navy actually acted on that.

12                 The defense will provide evidence to this Court that PFC  
13 Manning's custody status while at Quantico was as a result of a  
14 direct order from the commander who supervised the commander of the  
15 Quantico Brig, so his immediate supervisor, and he gave a direct  
16 order that PFC Manning will be held in maximum custody and under  
17 prevention of injury status indefinitely. He will not be removed  
18 from that status. That direct order was witnessed by two other O-6s,  
19 who will come and testify to hearing the order and questioning the  
20 wisdom of it, essentially. The defense believes that that witness  
21 may back off admitting that he gave the order but, again, we have two  
22 independent witnesses who support the fact that that order was given.

1                   Lieutenant Colonel Hilton is relevant to help bolster the  
2 fact that that order was, in fact, given because what we know of from  
3 her is that 19 April -- on 19 April 2011 PFC Manning goes to the  
4 Joint Regional Correctional Facility. He goes through, and she will  
5 testify, the standard 9-day indoctrination period, and at the  
6 conclusion of that 9-day indoctrination period, he's placed in medium  
7 custody; no prevention of injury requirements. He's held like any  
8 other pretrial confinement detainee, and so what we're left to --  
9 when you look at that, what we're left to wonder is either the water  
10 at Fort Leavenworth has amazing healing -- mental health healing  
11 properties and he's no longer a risk to harm himself or others or his  
12 custody status while at Quantico was unlawful pretrial punishment.

13                  The defense cited the case *United States v. Kinzer* for  
14 the Court, 56 M.J. 739, and that case says that this Court can  
15 consider after-the-fact events in order to determine the  
16 reasonableness and legitimacy of a custodial classification. In  
17 *Kinzer*, once the individual actually signed his pretrial agreement,  
18 he magically was taken off of special quarters, and so the Court  
19 there said that was strong evidence that the decision to place him in  
20 special quarters prior to signing the pretrial agreement was  
21 arbitrary. Here, this Court, the defense will submit, won't even  
22 have to go that far, because we will be offering the evidence of the  
23 direct order, but Lieutenant Colonel Hilton can bring forth evidence,

1 much like with Kinzer and was the case in the Kinzer case, of the  
2 fact that since Manning's been at Fort Leavenworth, he hasn't been a  
3 flight risk. He hasn't tried to harm himself. The government cites  
4 one incident where PFC Manning got into an altercation with another  
5 detainee, and there -- Lieutenant Colonel Hilton can talk about that  
6 and how even after that event he was returned to medium custody  
7 within short order; no other issues. So we believe that her  
8 testimony is relevant and necessary. Again, being reasonable, we're  
9 perfectly fine and content with having her testify telephonically.

10                 The next witness that the government opposes is Mr. Juan  
11 Mendez. Mr. Juan Mendez is the UN Special Rapporteur on torture and  
12 other cruel, inhumane, and degrading treatment. Mr. Mendez we  
13 believe is relevant for several reasons. First, he's going to be  
14 used to support the fact that PFC Manning's pretrial confinement  
15 conditions at Quantico were onerous and unlawful at that time.

16                 MJ:     How does he have any idea?

17                 CDC[MR. COOMBS]: He contacted the government. Once the public  
18 became aware of how my client was being treated at Quantico, the UN  
19 decided to take a look into it, and in particular Mr. Juan Mendez,  
20 and he contacted the government to inquire as to the confine -- the  
21 custody status of PFC Manning and why he was being held in that  
22 manner; and what he was told and the memorandums that he received

1 back from the United States Government was PFC Manning was being held  
2 in that custody status due to the serious nature of the offenses.

3 MJ: You have those memorandums?

4 CDC[MR. COOMBS]: I do, Your Honor.

5 MJ: Then why do I need him?

6 CDC[MR. COOMBS]: Well because the other aspect of why it would  
7 be relevant at this point is once he found out about that, then he  
8 made a request, as his job would be, to actually meet with Manning to  
9 -- in order to figure out exactly, you know, what his status was, his  
10 custody status; why he was being held; and the impact that that was  
11 having on him. He made a request and under the Quantico Brig rules,  
12 you can have an official visit that is unmonitored, and under the UN  
13 requirements of his job he will say that whenever I visit any  
14 detainee it is unmonitored and that way the detainee can feel free to  
15 speak to me openly and candidly without fear of reprisal and that's  
16 in other countries.

17 MJ: Let me stop you for just a minute. So there's Quantico  
18 rules that say you can have official, unmonitored visits.

19 CDC[MR. COOMBS]: If it's an official visit.

20 MJ: Well what's considered an "official visit?"

21 CDC[MR. COOMBS]: And that became the very first example of  
22 using term -- using words in defining your way out of allowing  
23 official visits. "Official visits" ultimately became, and this is

1 part of our motion, ultimately became a -- if you're an attorney,  
2 essentially, so even Representative Dennis Kucinich who wanted to  
3 have a visit with PFC Manning was determined not to be an official  
4 visit. But most troubling for Juan Mendez is he deals with other  
5 countries where they allow an unmonitored visit because that's the UN  
6 requirements, and he will testify that he was surprised that the  
7 United States, a country that champions the UN and its mission and  
8 champions the rights of individuals ----

9 MJ: How is any of this relevant to Article 13?

10 CDC[MR. COOMBS]: Well it's relevant because we're going to say  
11 that that's another example of the unlawful pretrial punishment.

12 MJ: How could that be unlawful pretrial punishment?

13 CDC[MR. COOMBS]: PFC Manning went through every legitimate  
14 channel, and we'll show the Court, every legitimate channel to  
15 challenge his custody status.

16 MJ: Okay.

17 CDC[MR. COOMBS]: And when he attempted to go outside of the  
18 normal channels, in this case go to the UN in order to plead his  
19 case, ----

20 MJ: Okay.

21 CDC[MR. COOMBS]: ---- and with the ability of having a UN  
22 Special Rapporteur to come there to hear what he would say, the  
23 government prevented that from happening, and we would say that that

1 prevention of not allowing him to meet with Mr. Juan Mendez  
2 unmonitored was another aspect of the unlawful pretrial punishment;  
3 and the reason why that was so was because as long as you could keep  
4 this just simply within the government and the Quantico Brig, then no  
5 one would ever find out about this other order that we ultimately did  
6 find out about after the fact. You wouldn't have an outside  
7 organization actually looking into why he was being held in a certain  
8 way and what were the reasons behind it. And so our position is that  
9 by preventing such a visit, this was in furtherance of the unlawful  
10 pretrial order that was given to keep Manning in a particular custody  
11 status. Mr. Mendez is local. It's not an overly burdensome task to  
12 produce him. He's willing to come testify, and the defense's  
13 position, his testimony will, again, provide this Court with  
14 additional evidence of the conduct and activity of the officials at  
15 Quantico Brig.

16 MJ: Did he ever go to Quantico?

17 CDC[MR. COOMBS]: He did not. He inquired, requested. They  
18 indicated that he could come but it would be monitored. He indicated  
19 to them that based upon the policies and procedures, and that's  
20 within our attachment, that he is governed by, he could not conduct  
21 an unmonitored visit -- or, excuse me, a monitored visit, unless the  
22 detainee said, "Fine. I'll go ahead and consent." In this case, PFC  
23 Manning would not do that and for good reason; and what we'll show

1 again within the Article 13 motion is PFC Manning was quickly placed  
2 in a position of a catch-22. If he did anything that the confinement  
3 facility thought was out of the norm, and we're talking minor  
4 deviations in any way, shape, or form, they wrote him up for that;  
5 and if he said anything that they thought could be interpreted as  
6 problematic, they increased their restrictions on him. If he didn't  
7 do anything, if he was a model detainee, and we'll show documentation  
8 again from Quantico indicating that time after time no issues,  
9 respectful, polite, he didn't do a thing, they would basically be  
10 searching for what are we missing; there must be something that we're  
11 missing. And from the documentation standpoint, it's clear that PFC  
12 Manning was never going to be taken out of MAX or POI, but when the  
13 Court hears about the order, then that will be clear why that was the  
14 case.

15 Now the requested evidence, we've asked that the  
16 government produce three pieces of physical evidence that's within  
17 the possession of the government: the issued suicide prevention  
18 smock, which is a garment that PFC Manning was required to wear after  
19 2 March ----

20 MJ: Are you looking for the actual smock that he wore or, I  
21 mean, do they carry multiple smocks; is this just like a sample of a  
22 smock or?

1           CDC[MR. COOMBS]: Actually looking for the -- ideally the actual  
2 smock that he wore, and the reason why is the smock that they  
3 provided to him was not built for a person of his size, and we'll --  
4 you'll -- the Court will have evidence of that fact that that smock  
5 actually produced a risk of harm to him and it was documented at one  
6 time and yet in spite of that they required him to wear this smock at  
7 the evening. They would take all of his clothing away, even though  
8 the mental health professional said, "There's no requirement. He's  
9 not going to harm himself. He's not at risk of self-harm." They  
10 still required him to strip and they would give him the smock to wear  
11 and the smock actually was a source of danger to him and the  
12 defense's position would be that that smock was unnecessary and is an  
13 example of onerous confinement conditions that were not warranted.  
14 So to actually see the smock and especially to see the smock in  
15 relation to my client we believe is required as opposed to just a  
16 picture that the government was offering to produce.

17           In addition to the smock, the suicide prevention blanket  
18 and the suicide prevention mattress. Again, ideally the mattresses  
19 -- or the mattress and the same type of blanket. It could be the  
20 same type of mattress, I guess, but ----

21           MJ: Why do I need to see the mattress as opposed to a picture  
22 of the mattress?

1           CDC[MR. COOMBS]: Yeah, and this goes again, same reason for the  
2 blanket, both items when you just look at them, like the suicide  
3 prevention blanket, may just look like any ordinary blanket,  
4 certainly a picture of it would, but it's only when you actually put  
5 your hand to the blanket that you realize that a suicide prevention  
6 blanket is basically a large piece of sandpaper and it's tear proof;  
7 having to endure month after month after month of the suicide  
8 prevention blanket basically would cause skin rashes or skin burns on  
9 my client, which the Court will hear about; and again, based upon the  
10 fact that the mental health professional said he was not a risk of  
11 self-harm, it again demonstrates a onerous condition of confinement  
12 that was not necessary; and when the Court considers the reasoning  
13 why that suicide prevention blanket was required, again going back to  
14 the order, PFC Manning will be held in MAX and POI indefinitely, it  
15 is again an example of unlawful pretrial punishment under Article 13.  
16 The mattress had a built-in pillow and was a very thin mattress.  
17 Again, being able to at least gauge the item that PFC Manning had to  
18 sleep on for essentially 9 months would be important for the Court to  
19 see, again, why the confinement conditions were overly burdensome and  
20 unnecessary and onerous and, again, a by-product of the unlawful  
21 pretrial order; had he not been subject to that order, he would have  
22 given -- been given a normal mattress and a normal pillow. These  
23 things may seem small in the abstract, but when you think about the

1 fact that this was my client's life for almost 9 months and his life  
2 in Quantico was restricted based upon an unlawful order and we find  
3 out 9 days after going to a new facility where there isn't a  
4 commander giving that unlawful order, he's now given the normal  
5 privileges of any other pretrial detainee. He doesn't have a suicide  
6 prevention blanket. He doesn't have a suicide prevention mattress.  
7 He doesn't have a smock. He's in -- he's able to go outside of his  
8 cell. He's not in his cell 23 hours a day. He's able to talk to  
9 other detainees; engage in recreation activities.

10               When the Court has the full benefit of the defense's  
11 filing, which at this point is almost in very near final format given  
12 the due date of it, but I'll tell the Court that it's in excess of  
13 100 pages, our motion, and it's not repeating itself.

14               MJ:     Is that including enclosures or is that the motion  
15 itself?

16               CDC[MR. COOMBS]: That's the motion itself, Your Honor.

17               MJ:     Oh, boy; okay.

18               CDC[MR. COOMBS]: And that's because of the fact that in this  
19 instance, unlike previous examples of Article 13 issues that I have  
20 personally dealt with, this one should shock the conscience of this  
21 Court.

22               Thank you, Your Honor.

1 MJ: All right.

2 Government?

3 TC[MAJ FEIN]: Your Honor, as far as Lieutenant Colonel Hilton,  
4 defense said it best, it's not relevant and necessary only because  
5 they want to use it to bolster the decision-making or their argument  
6 on what happened at Quantico. The Kinzer case is the most  
7 instructive. In the Kinzer case, the Court holds -- excuse me, Your  
8 Honor -- the Court holds that the fact that the appellant was  
9 released from special quarters the very next day after securing a  
10 pretrial agreement that limited his post-trial confinement to only 3  
11 years is strong evidence that his assignment to special quarters was  
12 based primarily upon the length of sentence policy, so the Court said  
13 that the decision that the same commander made in implementing the  
14 policy that they ultimately held was arbitrary policy. The decision  
15 they made the day of the pretrial agreement can be used to inform the  
16 arbitrary decision or whether the decision was arbitrary before; same  
17 commander; same decision; same policy. The defense wants to use  
18 Lieutenant Colonel Hilton, a different service, a different facility,  
19 in order to say whether the Quantico decision was; therefore, the  
20 government maintains it's not relevant.

21 MJ: All right.

22 TC[MAJ FEIN]: Your Honor, for ----

1 MJ: Well let's -- I think she is relevant. I'm going to ask  
2 -- the government's going to have to provide her testimony. You can  
3 do it telephonically.

4 TC[MAJ FEIN]: Yes, ma'am.

5 MJ: Go ahead. Mr. Mendez?

6 TC[MAJ FEIN]: Your Honor, for Mr. Mendez, Mr. Mendez never went  
7 to Quantico, never spoke to PFC Manning, and as the defense said it  
8 towards the end of argument for Mr. Mendez, Private First Class  
9 Manning was authorized to put any visitor on his visitors' list and  
10 PFC Manning and defense chose not to allow Mr. Mendez to come, even  
11 under the policy of Quantico Brig. Granted Mr. Mendez normally does  
12 show up or goes and interviews not -- in an unmonitored status, but  
13 he still could have gone and the defense chose not to allow him to go  
14 and he was willing to go at the end after we talked to him in  
15 preparation of this. It just -- his relevance to the unlawful  
16 pretrial punishment or the alleged unlawful pretrial punishment at  
17 Quantico, we can't see any relevance there, Your Honor.

18 MJ: All right, well I agree with the government on that one.  
19 This witness is not relevant.

20 Let's go to the evidence.

21 TC[MAJ FEIN]: Yes, Your Honor. The government does not contest  
22 the relevance of any of those pieces of evidence for a pretrial -- or  
23 Article 13 motion. The government ----

1 MJ: Now you want photographs. What's the problem -- well,  
2 does the smock exist?

3 CDC[MR. COOMBS]: Your Honor, the Marine Corps can't identify  
4 the actual smock, mattress, or blanket of Private First Class  
5 Manning, but they have been able to identify similar ones.

6 MJ: Mr. Coombs, you said size was an issue. Do you know what  
7 the size of the smock was?

8 CDC[MR. COOMBS]: I believe they just had a -- the smallest size  
9 available and that was -- I think it was a medium or a large or  
10 whatnot, whatever they were getting was the smock size that they got.  
11 The problem, again, from the defense's perspective is once you see  
12 the size that they use -- well ----

13 MJ: Well I guess my concern here is that they don't have the  
14 actual smock -- if they don't have it, we're now to the next step.  
15 We have to ----

16 CDC[MR. COOMBS]: Right.

17 MJ: ---- find one that they do have.

18 CDC[MR. COOMBS]: If the government produces the smock and I can  
19 see it in relation to my client, my client can tell me that, yeah,  
20 that this is basically the same smock, then I wouldn't have an  
21 objection.

22 MJ: I mean, do they come in small, medium, and large or how  
23 does that work?

1           TC[MAJ FEIN]: Your Honor, when we asked, it's one size and  
2 that's what they had, but ----

3           MJ:     So if there's one size, then all the smocks are the same.  
4           TC[MAJ FEIN]: If that -- but that was not the definitive answer  
5 we received when we inquired to what does still exist and what  
6 doesn't. Based off the Court's direction, the Marine Corps is ready  
7 to obtain any information or better pictures.

8           MJ:     Okay, what's the burden to the government of bringing the  
9 actual smock and the blanket?

10          TC[MAJ FEIN]: Your Honor, there's very little to no burden.  
11 The issue really is, is it's not necessary. The reason it's not  
12 necessary is because the Court for this motions hearing will be able  
13 to understand and plus to understand the effect and the effect is  
14 really independent on the person anyways, so that's what testimony  
15 brings out.

16          MJ:     Well wouldn't I get a better flavor for that if I  
17 actually saw the smock and the blanket?

18          TC[MAJ FEIN]: Where seeing the blanket and the reaction of the  
19 blanket if someone gets a rash or not is so independent it'd be,  
20 again, based off the individual; but if the Court is inclined to  
21 think that ----

22          MJ:     I am inclined to do that. Go ahead and bring ----

23          TC[MAJ FEIN]: Absolutely, Your Honor.

1 MJ: ---- the blanket and bring the smock.

2 Now how big is the mattress?

3 TC[MAJ FEIN]: Your Honor, it's a single; it's essentially a

4 twin-size mattress, so it's I would estimate just from the picture

5 I've seen it's probably 4 to 6 inches thick.

6 MJ: So if somebody had a little pickup truck, it could come

7 from Quantico to the Courtroom?

8 TC[MAJ FEIN]: I'm sure that we in the Army can figure that out,

9 Your Honor.

10 MJ: All right, well let's do that, and ----

11 TC[MAJ FEIN]: Okay, Your Honor.

12 MJ: ---- I'm sure there's going to be no objection to

13 substituting photographs for the record for the exhibits?

14 CDC[MR. COOMBS]: No objection, Your Honor.

15 MJ: All right. Bring ----

16 TC[MAJ FEIN]: Yes, ma'am.

17 MJ: ---- the physical exhibits.

18 Anything else with respect to this motion?

19 CDC[MR. COOMBS]: No, Your Honor.

20 TC[MAJ FEIN]: No, Your Honor.

21 MJ: Anything else with -- that we need to address before we

22 recess the Court?

23 CDC[MR. COOMBS]: No, Your Honor.

1 [No response from trial counsel.]

2 MJ: All right, as I said earlier, I've got to get a number of  
3 things that I need to do over this recess, so if we reconvene at  
4 1500, does that work for everyone?

5 CDC[MR. COOMBS]: Yes, Your Honor.

6 TC[MAJ FEIN]: Yes, Your Honor, and before you recess, Your  
7 Honor, we have copies of the supplemental questionnaire completed for  
8 the Court to take into consideration.

9 MJ: All right. I'll do that while I'm on recess.

10 TC[MAJ FEIN]: Yes, ma'am.

11 MJ: Court is in recess till 1500.

12 [The Article 39(a) session recessed at 1228, 19 July 2012.]

13 [The Article 39(a) session was called to order at 1531, 19 July  
14 2012.]

15 MJ: This Article 39(a) session is called to order. Let the  
16 record reflect all parties present when the Court last recessed are  
17 again present in court.

18 Mr. Coombs, why am I getting evidence 5 minutes before I  
19 make a ruling on a motion? I know I asked you for that, but why  
20 wasn't that submitted with the original motion?

21 CDC[MR. COOMBS]: Because the Court asked me for it during the  
22 argument, so I pulled the article as I ----

1 MJ: I understand that, but if you've had the evidence before  
2 and you're asking me to compel discovery, it would help to give me  
3 the evidence?

4 CDC[MR. COOMBS]: Well, Your Honor, again, as we were discussing  
5 it in the oral argument and the Court asked why would we want to have  
6 the background information on persons identified at risk, I gave my  
7 reasoning for that. The Court asked well do you have any copies of  
8 what you're saying that there are some news sources where individuals  
9 were identified saying that's not a big deal. At that point I  
10 responded, yes, I do. I guess the answer is I didn't believe that  
11 that evidence in the motion was required at that point because I --  
12 that wasn't a basis in which I was in the motion advancing; that a  
13 State Department witness would say, "The following 50 people were  
14 injured because of these leaks." It's only based upon the  
15 government's argument saying what they would actually offer, some  
16 person to come up ahead of that, persons identified at risk, to say,  
17 yeah, these individuals were harmed but they're not going to give the  
18 actual names of the people, and then that's where we get into our  
19 dialog of why do I need the names? And I said, well, we need the  
20 names because if they identify -- in this article here it identifies  
21 a person by name who says, yeah, I don't care that my name's out in  
22 the public. I didn't believe that what I had to say was a big deal;  
23 say our bosses knew we were speaking to the United States Government.

1 On having my identity protected, I didn't ask for that. There was  
2 nothing to protect. So it was only out of the dialog of our oral  
3 argument that this issue came to head, and the Court asked the  
4 defense to provide this information to the Court, so within 30, 40  
5 minutes of having the break, I was able to locate it and provide it  
6 to the Court and the government. I apologize if the Court believes  
7 that that was in some way deficient on my part. It was just intended  
8 to be the opposite. I was intending to be efficient.

9 MJ: All right, Mr. Coombs. Just understand you have the  
10 burden of relevance and necessity for production.

11 CDC[MR. COOMBS]: I do understand that, Your Honor, and had this  
12 been an issue that was part of the motion, I would agree with the  
13 Court that this would be something that would -- should have been  
14 part of my filing had it been in the motion, but this was an issue  
15 that its birth was this morning's oral argument based upon what the  
16 government said they were going to be offering the person for and  
17 their request at that point, which is not in their motion, at that  
18 point not to provide the names or the personal identi ----

19 MJ: Prosecution Supplemental Response to Defense Motion to  
20 Compel Discovery Number 2, dated 9 July 2012: The prosecution  
21 respectfully requests the Court to deny the defense addendum insofar  
22 as the defense's request consists of the following three categories  
23 of information that are not relevant and necessary for production:

1   (3) Personally identifi -- PII of persons negatively affected by the  
2   unauthorized disclosures, to include those persons identified by the  
3   WikiLeaks Persons at Risk Group as being put at risk.

4           CDC[MR. COOMBS]: Yes, and the issue where that coalesces into  
5   an actual issue for this document to be relevant is when the  
6   government says, "We're still putting somebody on the witness stand  
7   that's going to testify about persons who have been identified at  
8   risk and we're going to talk about these individuals and what we did  
9   but we're going to talk about that in general," so if their position  
10   was, much like with the Mitigation Team, we're not going to offer any  
11   evidence about persons identified at risk; that's why we don't  
12   believe the defense needs that, well that would be a different story;  
13   much like with the Mitigation Team they have said, at least the  
14   defense understands them to say, that we're not going to offer any  
15   evidence on any steps that the Department of State has done to  
16   prevent something similar from happening in the future or went  
17   through the exchange with the government on that and they said no,  
18   we're not, so that may be a position where the Court would say, okay,  
19   if the government's not offering that, Defense, you don't really need  
20   it; but here, there was nothing in their filing short of their  
21   argument today where they said we are actually still going to offer  
22   evidence on persons who have been identified at risk and what the  
23   State Department did but we don't want to give the defense the

1 ability to see who those people are or be able to cross-examine that  
2 in any way, shape, or form. That's when I mentioned I was aware of  
3 this type of information where somebody who has been identified and  
4 here the Associated Press took it upon themselves after the  
5 disclosure to identify those people within the cables where the cable  
6 itself said these people are at high risk and what they concluded was  
7 that the dire warnings were overblown; that the individuals that they  
8 contacted indicated that they didn't believe they were at risk and  
9 they also didn't believe that the information needed to be protected,  
10 so that's why the defense offered this to the Court at that time.

11 MJ: All right, thank you. Let's move on.

12 I believe -- were you getting up for another reason?

13 CDC[MR. COOMBS]: No, Your Honor. I just, as you called my  
14 name, I stood up.

15 MJ: Okay.

16 All right, Government, just to remind me, on the eight  
17 categories there, was it the Mitigation Team or the WikiLeaks Working  
18 Group that you weren't going to present evidence on in sentencing?

19 TC[MAJ FEIN]: Your Honor, it's the Mitigation Team that the  
20 government was not intending to elicit on what the Mitigation Team  
21 did and the effects of what they did and how they did it.

22 MJ: Okay.

1                   All right, the Court is prepared to issue rulings on both  
2 the motion to compel Department of State discovery and the  
3 government's motion to preclude reference to actual harm or damage on  
4 the merits. I'll start with that one since we did that first.

5                   Government moves to preclude defense from raising or  
6 eliciting any discussion, reference, or argument, to include the  
7 introduction of any documentary or testimonial evidence relating to  
8 actual harm or damage from pretrial motions related to the merits  
9 portion of the trial and from the merits portion of the trial.  
10 Defense opposes. After considering the pleadings, evidence  
11 presented, and argument of counsel, the Court finds and concludes the  
12 following:

13                   Proffer by the government:

14                   1. The accused is charged with one specification of  
15 aiding the enemy; one specification of disorders and neglects to the  
16 prejudice of good order and discipline and service discrediting  
17 conduct; eight specifications of violations of 18 United States Code  
18 Section 793(e); five specifications of violations of 18 United States  
19 Code Section 641; two specifications of violations of Article -- of  
20 18 United States Code Section 1030; and five specifications of  
21 violating a general regulation, in violation of Article 1 -- Articles  
22 104, 134, and 92, Uniform Code of Military Justice.

1                   2. The charged offenses relate to the release of more  
2 than 127 records, files, or cables in four databases considering --  
3 consisting of more than 720,700 records. Multiple government  
4 agencies and departments measured what, if any, harm or damage  
5 transpired because of the alleged misconduct. Some of the agencies  
6 and departments prepared damage assessments to memorialize their  
7 findings, including the Information Review Task Force, WikiLeaks Task  
8 Force, Department of State, and ONCIX.

9                   3. On 16 February 2012, defense submitted its motion to  
10 compel discovery for the damage assessments. Defense argued that the  
11 damage assessments were at odds with the classification review  
12 conducted by the OCA and the substance, quote, would undercut the  
13 testimony of each original classification authority for the charged  
14 documents. The defense concluded both in its motion to compel  
15 discovery and at the public motions hearing that the damage  
16 assessments were material to the preparation of defense, both for  
17 merits and sentencing, citing articles indicating that the  
18 compromised information, quote, unquote, caused only limited damage.

19                  4. On 23 March 2012, the Court ordered the United States  
20 to produce any unclassified discoverable information from those  
21 assessments and to immediately begin the process of producing the  
22 damage assessments that are outside the possession, custody, and

1 control of military authorities. The government is in the process of  
2 producing the damage assessments.

3               5. Producing a damage assessment generally requires the  
4 owner of the information to engage in a four-step process. First,  
5 verify the classification of the information; second, reevaluate the  
6 classification of the information; third, determine whether there are  
7 countermeasures to minimize or eliminate the damage to national  
8 security; and, fourth, prepare the damage assessment.

9               6. The damage assessment measures, "Given the nature of  
10 the information in countermeasures, if any, that will be employed,  
11 the probable impact, the compromise it will have on our national  
12 security, unquote, producing a damage assessment, quote, is sometimes  
13 a long-term, multidisciplinary analysis of the adverse effects of the  
14 compromise on systems, plans, operations, and/or intelligence".

15               Reasons the government moves to preclude mention of  
16 actual damage on the merits:

17               1. Actual damage is not relevant to the charges facing  
18 the accused or to any available defense.

19               a. None of the charges require the government to prove  
20 actual damage; therefore, actual damage is not relevant to any  
21 element of any offense for which the accused is charged.

1                   b. Actual damage is not relevant to whether the  
2 documents were classified or whether they relate to the national  
3 defense.

4                   c. Actual damage is not relevant to any defense.

5                   d. The evidence is not relevant to cross-examine the  
6 original classification authority because classification reviews are  
7 forward-thinking where the OCA determines whether the unauthorized  
8 disclosure of the information could reasonably be expected to result  
9 in damage to the national security. Use of damage assessments to  
10 impeach an original classification authority who prepared a  
11 classification review would be improper.

12                  e. Challenges to the classification review conducted by  
13 the OCA are non-justiciable political questions. Classification  
14 reviews determine whether -- determine that the unauthorized  
15 disclosure of the information could reasonably be expected to result  
16 in damage to the national security. Damage assessments may be  
17 relevant to impeach an OCA but only if the OCA authored the document  
18 and only with respect to the assessment, not the classification  
19 review under Rule for Court-Martial 914.

20                  2. Even if relevant, the evidence should be excluded  
21 under M.R.E. 403 because the probative value of the actual damage  
22 would be outweighed by the danger of unfair prejudice, confusion of  
23 the issues, misleading the members, or by considerations of undue

1 delay, waste of time, or needless presentation of cumulative  
2 evidence. Evidence of actual harm or lack of will create an undue  
3 tendency to lure fact finder into -- the fact finder into finding  
4 guilt or innocence irrespective of evidence supporting the charge.

5                   Defense proffered reasons why the Court should deny the  
6 government motion:

7                   1. The government motion is overbroad and that it seeks  
8 to prevent the defense from introducing any evidence related to  
9 actual harm or damage. Specific information and damage assessments  
10 could be relevant to whether the information was expected to cause  
11 harm.

12                  2. Actual damage is relevant to the 18 United States  
13 Code Section 793(e) and Section 1030(a)(1) offenses in that the  
14 absence of actual harm is probative of whether the information leaked  
15 was the type that the accused reasonably believed would cause harm.

16                  3. Actual damage is relevant to the 18 United States  
17 Code Section 793(e) and Section 1030(a)(1) offenses in that absence  
18 of actual harm is probative of whether the accused had reason to  
19 believe that the information leaked could cause injury to the United  
20 States or to the advantage of any foreign nation.

21                  4. Actual damage is relevant to Specification 1 of  
22 Charge II in that lack of damage is probative of whether the accused  
23 acted wantonly.

1               5. Actual damage is relevant to the accused's defense  
2 that by virtue of his expertise and training he knew which documents  
3 and information could be used to the injury of the United States or  
4 to the advantage of any foreign nation and selected only that  
5 information to release. Lack of damage corroborates the  
6 reasonableness of that belief.

7               6. Absence of damage is improper -- is proper  
8 impeachment for original classification determinations that  
9 information could cause damage.

10              7. Absence of damage is proper to explore the bias of  
11 government agency witness who -- witnesses who exaggerate potential  
12 damage.

13              The Law:

14              Military Rule of Evidence 401 defines relevant evidence.  
15 "Relevant evidence" means evidence having any tendency to make the  
16 existence of any fact that is of consequence to the determination of  
17 the action more or less probable than it would be without the  
18 evidence. The military judge has the initial responsibility to  
19 determine whether the evidence is relevant under Rule for Court-  
20 Martial 401, *United States v. White*, 69 M.J. 236, Court of Appeals  
21 for the Armed Forces 2010.

22              2. M.R.E. 402 provides that all relevant evidence is  
23 admissible except as otherwise provided by the Constitution of the

1       United States as applied to members of the armed forces, the Code,  
2       these rules, this Manual, or any act of Congress applicable to  
3       members of the armed forces. Evidence which is not relevant is not  
4       admissible.

5                   3. Relevant evidence is necessary when it is not  
6       cumulative and when it would contribute to a party's presentation of  
7       the case in some positive way in a matter at issue. A matter is not  
8       at issue when it is stipulated as a fact. Discussion to, R.C.M.  
9       703(b) (1).

10                  4. M.R.E. 403 provides that relevant evidence may be  
11       excluded if its probative value is substantially outweighed by the  
12       danger of unfair prejudice, confusion of the issues, or misleading  
13       the members or by considerations of undue delay, waste of time, or  
14       needless presentation of cumulative evidence.

15                  5. The Sixth Amendment to the Constitution provides an  
16       accused with the right to confront witnesses against him; that right  
17       includes cross-examination and an opportunity to impeach witnesses.  
18       The right to cross-examination is not absolute. Courts balance  
19       competing state interests inherent in rules limiting cross-  
20       examination. *Chambers v. Mississippi*, 410 U.S. 480 -- 284 at 295  
21       (1973); *Davis v. Alaska*, 415 U.S. 308 at 316 (1974); *Crane v.*  
22       *Kentucky*, 476 U.S. 683 at 690 (1986). Judges retain wide latitude to  
23       impose reasonable limits on cross-examination based on concerns

1 about, among other things, harassment, prejudice, confusion of the  
2 issues, witness safety, repetitive or irrelevant questions.

3                   Conclusions of Law:

4                 1. The United States Code Section 793(e) and 1030(a)  
5 offenses require the government to prove that at the time the accused  
6 allegedly disclosed the information in each of the relevant  
7 specifications, the accused had reason to believe the information he  
8 disclosed could be used to the injury of the United States or the  
9 advantage of any foreign nation and that the accused acted willfully  
10 in that he made a conscious choice to communicate the covered  
11 information.

12               2. Specification 1 of Charge II requires the government  
13 to prove that the accused wrongfully and wantonly caused to be  
14 published on the Internet intelligence belonging to the United States  
15 Government having knowledge that intelligence published on the  
16 Internet is accessible to the enemy.

17               3. Whether actual harm or damage resulted is not an  
18 element of any of the charged offenses nor is it probative of whether  
19 the accused had reason to believe that the information leaked could  
20 be used to the injury of the United States or the advantage of any  
21 foreign nation nor is it probative of the accused's state of mind at  
22 the time of the commission of the alleged offenses.

1                  4. The first five bases of the defense's relevance  
2 proffer for lack of actual damage all relate to the nature of the  
3 information disclosed and the accused's state of mind on or before  
4 the dates he disclosed the information. What, if any, actual damage  
5 occurred after disclosure of the information was not knowable to the  
6 accused at the time he disclosed the information, thus actual damage  
7 or lack thereof is not relevant to any of those five bases. The  
8 critical language is reason to believe could be used. *United States*  
9   *v. Diaz*, 69 M.J. 127 at 132, Court of Appeals for the Armed Forces  
10 2010.

11                 5. Similarly, the CCA classification determinations for  
12 the information allegedly disclosed by the accused were made on or  
13 before the dates of disclosure. Again, the relevant point of inquiry  
14 is the nature of the classification status -- nature and  
15 classification status of the information on or before the date of  
16 disclosure. What, if any, future damage actually resulted was not  
17 knowable to the OCA at the time the OCA made the classification  
18 decision. Even if an OCA misjudged the information upon which it has  
19 based its classification decision does not change the fact that the  
20 decision itself was made and communicated to the accused. Post-  
21 release damage or lack thereof is not relevant to impeach an OCA.

22                 6. A secondary basis for excluding evidence of actual  
23 damage is under Military Rule of Evidence 403 by allowing evidence of

1 actual damage when the relevant inquiries on the nature of the  
2 information allegedly disclosed on or before the disclosure whether  
3 the accused had reason to believe the information could be used to  
4 the injury of the United States to the advantage of any foreign  
5 nation on or before the date of disclosure and the accused's *mens rea*  
6 on or before the date of disclosure. The members will be confused --  
7 the members or the fact finder will be confused by the focus of the  
8 trial shifting to whether there was or was not actual damage and  
9 what, if any, steps were taken by the government to mitigate that  
10 damage.

11               7. The Court does not have sufficient information at  
12 this time to preclude the defense from using evidence of actual  
13 damage to impeach a government witness for bias. The Court defers  
14 ruling unless and until that issue ripens at trial.

15               8. The Court defers ruling on whether lack of actual  
16 harm or damage assists in presenting a viable defense. In order for  
17 the Court to appropriately rule on whether actual damage corroborates  
18 the reasonableness of the accused's belief there must be some  
19 evidence that the accused knew the information could not be used to  
20 the injury of the United States to the advantage of any foreign  
21 nation.

22               9. The government motion to preclude the defense from  
23 raising or eliciting any discussion referenced or argument, to

1 include introduction of documentary or testimonial evidence relating  
2 to actual harm or damage from pretrial motions related to the merits  
3 portion of the trial and from the merits portion of the trial, is  
4 overbroad. The government motion to preclude the defense from using  
5 evidence of actual damage during the merits portion of the trial is  
6 granted in part as set forth in the preceding paragraphs. This  
7 ruling does not preclude the defense from using information in the  
8 damage assessments relevant to the nature of the information as it  
9 existed on or before the dates of the alleged disclosure of the  
10 information by the accused.

11 Ruling: The Court finds that actual harm or damage is  
12 neither an element nor relevant to an element of these  
13 specifications. Accordingly, both the government and the defense are  
14 precluded from introducing evidence of actual harm or damage during  
15 the merits portion of the trial without prior approval of the Court.  
16 The government motion to preclude actual harm or damage from the  
17 pretrial motions practice and the merits portion of the trial is  
18 granted in part. This ruling does not affect the ability of either  
19 side to present actual damage evidence at sentencing.

20 All right, any questions on that ruling?

21 CDC[MR. COOMBS]: No, Your Honor.

22 TC[MAJ FEIN]: No, Your Honor.

1 MJ: All right. And the Court is also prepared to rule on the  
2 defense motion to compel Department of State discovery.

3 1. The government has identified the following  
4 potentially discoverable information from the Department of State:

5 (1) The written assessments produced by the Chiefs of  
6 Mission used to formulate a portion of the draft damage assessment  
7 completed in August of 2011 consisting largely of cables sent to and  
8 from affected embassies relating to the cables released up until  
9 August of 2011;

10 (2) The written situational reports produced by WikiLeaks  
11 Working Group, a 24/7 working group composed of senior officials from  
12 throughout the Department designed to monitor the immediate crisis  
13 stemming from the released cables and coordinate the Department's  
14 response roughly -- between roughly 28 November 2010 and 17 December  
15 2010 consisting of then real-time developments regarding cables  
16 released up until that time, summaries of published news articles  
17 relating to the cables released up until that time, updates from  
18 selected regions of the world regarding cables released up until that  
19 time;

20 (3) The minutes and agendas of meetings by the Mitigation  
21 Team, a group created to address the policy, legal security,  
22 counterintelligence, and information assurance issues presented by  
23 the release of these documents consisting of formal meeting notes,

1   PowerPoint slides of administrative matters and substantive issues,  
2   and documentation on information exchanged with other federal  
3   organizations;

4                     (4) The information memorandum for the Secretary of State  
5   produced by WRA -- WPAR, a group tasked with identifying persons  
6   referenced in released cables who are at risk, providing guidance to  
7   local embassies who request assistance on behalf of those persons,  
8   and tracking all persons at risk; consists of background information  
9   relating to the creation of the WPAR, any assistance requested by  
10   embassies from the WPAR, to include examples of requested assistance,  
11   regional reports by bureaus, guidance to embassies on how to identify  
12   and assist persons at risk, summaries of WPAR duties and the status  
13   of reviewed cables related to persons at risk;

14                     (5) The matrices produced by WPAR consist of PII of  
15   individuals and their family members who were identified by WPAR as  
16   persons at risk based upon released cables to track the status of  
17   those individuals. And the government put in a footnote there. For  
18   purposes of this motion, the prosecution considers PII to include any  
19   information that could be used by another to identify a specific  
20   individual;

21                     (6) The formal guidance produced by WPAR and provided to  
22   all embassies, including authorized actions for any identified person  
23   at risk consisting of procedures for embassies seeking assistance

1 from WPAR, the steps the Department takes should someone request  
2 relocation, additional options available to the embassies, and a list  
3 of best practices;

4 (7) The information collected by the Director of the  
5 Office of Counterintelligence and Consular Support within the  
6 Department regarding any possible impact from the disclosure of  
7 diplomatic cables consisting -- consists of translated foreign open  
8 source Internet articles; select cables; the Department's draft  
9 damage assessment, dated August 2001 [sic], to which the defense  
10 already has access; regional assessments relating to the released  
11 cables; and no other versions of the draft assessment; and

12 (8) The Department did not find any prepared written  
13 statements for the Department's reporting to Congress on 7 and 9  
14 December 2010. Based upon those dates and Under Secretary Kennedy's  
15 testimony, only informal discussions would have occurred between the  
16 Department officials and members of Congress; therefore, there are no  
17 written statements or other documents.

18                   2. The volume of records gathered is more than 5,000  
19 documents and most are classified. In light of the volume of the  
20 documents and interagency coordination involved, the government  
21 requests 45 to 60 days to review the documents and determine whether  
22 to seek limited disclosure or claim of privilege. The defense  
23 opposes.

1                   3. The government has advised the Court of its intent in  
2 sentencing to introduce evidence of actual harm and impact to the DoD  
3 regarding each of the above categories of evidence except category 3  
4 and 8, which evidence, the government asserts, does not exist.

5                   4. The Court has previously ordered disclosure of the  
6 interim damage assessment prepared by the Department of State to the  
7 defense.

8                   5. The government moves the Court to deny the defense  
9 motion to compel the following information on the grounds that they  
10 are not relevant -- not relevant and necessary and for category 1  
11 that it is cumulative.

12                  (1) Information that predated and contributed to the  
13 Department of State draft damage assessment, dated August 2011;  
14                  (2) Purely administrative records; and  
15                  (3) Personally identifiable information of persons  
16 negatively affected by the unauthorized disclosures, to include those  
17 persons identified by the WikiLeaks Persons at Risk Group as being  
18 put at risk.

19                  6. The defense moves for this Court to order all Dos  
20 information not disclosed to the defense to be disclosed to the Court  
21 for *in camera* review and for the Court to order that all remaining  
22 discovery -- that the government -- or, excuse me, that the Court

1 order the government to consult with equity holders simultaneously  
2 while gathering discovery.

3               7. The Court has advised -- the defense has advised the  
4 Court that it has evidence of alleged people at risk coming forward  
5 publicly to state that they were not at risk. The defense provided a  
6 newspaper article to the Court today, which is Enclosure 1 now of the  
7 defense motion; is that correct?

8               CDC[MR. COOMBS]: That is correct, Your Honor.

9               MJ: All right, and for the record it's entitled -- it's from  
10 the *Guardian*, entitled "AP review finds no WikiLeaks sources  
11 threatened."

12               The Law: The Court adopts the law as set forth in its  
13 23 March 2012 and 22 June 2012 ruling on -- rulings on discovery  
14 issues.

15               Conclusions of Law:

16               1. The government shall search all of the above  
17 information for material required to be disclosed to the defense that  
18 is material and favorable to the defense under *Brady v. Maryland*, 373  
19 U.S. 83 at 1963 -- excuse me, (1963).

20               2. The government is presenting evidence in sentencing  
21 aggravation, to include expert opinion testimony, of the damage to  
22 the Department of State foreign relations and national security  
23 because -- caused by the accused's alleged disclosures. Information

1 that forms the basis of the sentence aggravation and/or an expert  
2 opinion is material to the preparation of the defense and relevant  
3 and necessary to be produced under R.C.M. 703(f) for discovery.  
4 Aggravating information that the government will not use or reference  
5 during sentencing or that does not form the basis of a government  
6 witness's opinion is not material to the preparation of the defense  
7 or relevant and necessary for discovery.

8               3. The underlying raw data forming the basis for the  
9 damage assessment is not cumulative for discovery purposes. It is  
10 material to the preparation of the defense and relevant and necessary  
11 to be produced for discovery under R.C.M. 703(f)

12               4. The government has advised the Court that it will not  
13 present any evidence in sentencing regarding the Mitigation Team. As  
14 such, the government is required only to disclose *Brady* material from  
15 this information to the defense.

16               5. The Court grants the government's motion to exclude  
17 purely administrative records and records that are not relevant to  
18 this case. The government will produce and disclose any records of  
19 the timing of relevant group meetings and how long the meetings  
20 lasted.

21               6. The government motion to exclude PII of persons  
22 negatively affected by the accused's alleged disclosures is granted  
23 except that the government will disclose the PII of any persons

1 identified in the newspaper article the defense presented to the  
2 Court that is maintained by the DoS as persons negatively affected.  
3 The defense has not presented evidence to the Court that any  
4 additional PII is relevant and necessary for discovery.

5               7. The defense motion to require the government to  
6 provide the defense with all discovery or to give all information not  
7 disclosed to the Court for *in camera* review is denied.

8               Ruling: The Defense Motion to Compel Discovery 2 of  
9 State Department information is granted in part as set forth above.

10               By 14 September 2012 the government will disclose all  
11 discoverable information set forth above to the defense, submit the  
12 discoverable information to the Court for *in camera* review as limited  
13 disclosure under M.R.E. 505(g), or advise the Court if the Department  
14 of State claims a privilege under M.R.E. 505(c) and provide notice to  
15 the Court and to the defense whether the government seeks an *in*  
16 *camera* proceeding under M.R.E. 505(i).

17               So ordered this 19th day of July, 2012.

18               Are there any questions with respect to this order?

19               CDC[MR. COOMBS]: Yes, Your Honor.

20               Just in regards to the PII, if the defense produces  
21 additional articles with names of individuals, would that fall under  
22 the Court's order?

1 MJ: Of individuals that are similar to this article that  
2 you've just described?

3 CDC[MR. COOMBS]: Yes, Your Honor.

4 MJ: Yes.

5 CDC[MR. COOMBS]: Thank you, Your Honor.

6 TC[MAJ FEIN]: No questions, Your Honor.

7 MJ: All right.

8 Is there anything else that we need to address today? I  
9 know I still have outstanding the FBI 505(g) order to get out to you.  
10 I plan on doing that later today. I don't see any need for us to go  
11 back on the record for -- just to announce that order: does either  
12 side?

13 CDC[MR. COOMBS]: No, Your Honor.

14 TC[MAJ FEIN]: No, Your Honor.

15 MJ: Okay. We can summarize that, then, at the next session.  
16 And the Court has been given by the government the final  
17 questionnaire that both sides have come to agreement to; is that  
18 correct?

19 CDC[MR. COOMBS]: Yes, Your Honor.

20 TC[MAJ FEIN]: Yes, Your Honor.

21 MJ: All right, and I also need to review that, as well, but I  
22 see no reason to come back on the record for that; does either side?

23 CDC[MR. COOMBS]: No, Your Honor.

1           TC[MAJ FEIN]: Correct, Your Honor.

2           MJ: Okay. Are there any other outstanding issues that we  
3 have not addressed during this session?

4           CDC[MR. COOMBS]: Just one, Your Honor. With regards to the  
5 505(h)(2) notice, the government had indicated that it believed --  
6 well two things: that part of my 505(h)(3) notice was too general;  
7 and then secondly, they believed I needed to identify witnesses by  
8 name. I have spoken with the government and informed them that my  
9 505(h)(3) notice that I filed with the Court was in reference to the  
10 charged documents. When the defense references in general, it's  
11 referencing the documents that are charged under 641 that are not  
12 actually parsed out by Bates number and singled out by the  
13 government. So the defense when it supplements its 505(h)(3) notice  
14 under the case calendar for the damage assessments will give the  
15 greater specificity as to what we're going into in the documents that  
16 would fall under 641 charging by the government. After telling that  
17 to the government, they seemed to be okay with that aspect of the  
18 505(h)(3) notice.

19           With regards to the names, the -- once the defense has  
20 had the ability to get the government's final witness list, we will  
21 give the government notice as to which of the witnesses we intend to  
22 go into the charged documents with. I think ----

23           MJ: Well I thought you had the government's witness list?

1           CDC[MR. COOMBS]: Well it's -- they're going to be supplementing  
2 that witness list and ----

3           MJ: Well I assume when they get your witness list, they may  
4 be looking for additional witnesses if there's any potential rebuttal  
5 ----

6           CDC[MR. COOMBS]: Exactly, Your Honor.

7           MJ: Okay.

8           CDC[MR. COOMBS]: And as we interview the witnesses, for  
9 example, the State Department witnesses, we haven't heard back yet on  
10 the Touhy request, whether or not that would be approved, the request  
11 we filed 4 months ago, but the government is viewing -- or trying to  
12 find out whether or not that's even a requirement now that these  
13 witnesses are on their witness list. Assuming that there's no  
14 barriers to us interviewing the State Department witnesses, once I  
15 have the ability to sit each of them down, interview them, then I can  
16 identify which of the charged documents with which witness is  
17 relevant. I will provide the government with the name of the witness  
18 and the Bates number of the document that I intend to discuss with  
19 them.

20           MJ: Okay. So just let me make sure I -- well, okay.

21           Government, you have any comment on what Mr. Coombs just  
22 said?

1           TC[MAJ FEIN]: No; that was a good summary, Your Honor. The  
2 only other thing I will add is that our understanding is also that  
3 with the defense witness list they provide what information they  
4 would like to elicit from their -- the defense witnesses with respect  
5 to some of the information in the charged documents as well.

6           CDC[MR. COOMBS]: Yes; with regards to that, if we are --  
7 actually there's two wrinkles to this. If it's a defense witness  
8 who's entitled to the information already so the Court protective  
9 order doesn't apply to it, we'll inform the government that this  
10 defense witness we intend to discuss this charged document with them.  
11 If it is a defense witness that at this point under the Court's  
12 protective order we would have to seek approval in order to share the  
13 classified information with, we will provide the Court and the  
14 government with appropriate notice under the Court's protective  
15 order.

16           MJ: Okay.

17           Government, let me ask you a question on that. Assume we  
18 have a witness, maybe a defense witness, that doesn't have a  
19 clearance, an appropriate clearance, is it a particularized approval  
20 that the government seeks for that or does the person have to go  
21 through the clearance process?

22           TC[MAJ FEIN]: I believe the protective order speaks to that,  
23 Your Honor. We would -- I believe what the protective order says,

1 and I can look again, but I believe we have an opportunity to object  
2 to sort of getting the person the clearance, but if the Court deems  
3 the witness is relevant and necessary, we would obviously move  
4 through the process.

5 MJ: The reason I'm bringing this up is I don't think we have  
6 anything on the case calendar that's addressing those kinds of  
7 issues. Are you anticipating that they're going to arise?

8 CDC[MR. COOMBS]: The defense hopes not, Your Honor.

9 TC[MAJ FEIN]: It might if we in the -- if we object to the  
10 production of some of their witnesses, perhaps that could be sort of  
11 part of -- part and parcel of that litigation, but that's just  
12 speculation. The actual clearance -- if the Court deemed a witness  
13 relevant and necessary, the government can move rather quickly on  
14 getting that person an appropriate clearance, I believe. Well ----

15 ATC[CPT MORROW]: Assuming they're eligible for a clearance,  
16 Your Honor.

17 TC[MAJ FEIN]: Right.

18 ATC[CPT MORROW]: There's some caveats there.

19 MJ: Okay. Make a note to yourself, if you would, for the  
20 case calendar -- make two notes to yourself. One of them is to  
21 include this issue. I don't know where at the appropriate place it  
22 would be just yet, we can figure that out, and we also need to add a  
23 Jencks date. I don't think we have that on the case calendar.

1           CDC[MR. COOMBS]: And on that same line as far as notes for the  
2 case calendar, I don't think we've discussed when the government  
3 would have to provide its Article 13 witness list, and I understand  
4 that that would be certainly after I file my motion, but you'd  
5 imagine at this point, knowing who I'm calling, they have a pretty  
6 good idea, probably, who they would want to call, so the defense  
7 would request a date that gives us time in advance of the actual  
8 hearing to interview the witnesses.

9           MJ:       Okay.

10           Major Fein?

11           TC[MAJ FEIN]: Well, Your Honor, we just found out today it's  
12 going to be a 100-page motion, so we did ask originally for an extra  
13 week to go over the 100-page motion. After we process it, we'll have  
14 3 weeks to come up with a reply; that'll give the defense 2 weeks if  
15 they need a continuance after that or we can work this into the  
16 calendar and even spread that time out more.

17           MJ:       Wait a minute. What are we talking about here?

18           TC[MAJ FEIN]: Well, ma'am, for the government to figure out  
19 which witnesses for Article 13 purposes, we first need the defense's  
20 motion to understand exactly what they're alleging. Once we go  
21 through the 100 pages, then we can start figuring out which witnesses  
22 we would have or which facts we'd stipulate to. So I guess the whole  
23 point is, is we originally asked for an extra week up front knowing

1 this would be lengthy, not 100 pages lengthy; that extra week was  
2 just to process that and figure out the witnesses. So I guess the  
3 point is, is that in our reply 3 weeks after we get the 100-page  
4 motion, we would have our witnesses listed just like any other  
5 motion.

6 MJ: All right. Well let's do this. We don't have to decide  
7 in these 5 minutes with a date. I think it's a reasonable request by  
8 Mr. Coombs to have a date. It's also a reasonable request by the  
9 government to want to look at whatever it is you file before figuring  
10 that out, so bearing those -- both of those things in mind come up  
11 with something that will be sufficiently in advance of trial that,  
12 you know, Mr. Coombs, if you need additional witnesses based on what  
13 you're seeing from the government you can, you know, work that out  
14 too and, you know, have time to interview the witnesses.

15 CDC[MR. COOMBS]: Yes, Your Honor.

16 MJ: Okay, so we'll work through that when we talk about the  
17 case calendar.

18 Is there anything else we need to address before we  
19 close? We're basically closing this Article 39(a) session week.

20 CDC[MR. COOMBS]: Nothing from the defense, Your Honor.

21 TC[MAJ FEIN]: No, Your Honor.

22 MJ: All right, as I said before, the parties and I are going  
23 to be meeting in an R.C.M. 802 conference just to hammer out the

1 Court calendar. I believe we initially set a date for the 10th of  
2 August was supposed to be the next Article 39(a) session. The  
3 parties have advised me that they no longer -- that they don't wish  
4 to hold that session anymore, so our next session is going to be the  
5 session scheduled on the Court calendar and that's firm and that's  
6 the 27th of August through the 31st of August.

7 Does either side desire to state anything further with  
8 respect to the Court calendar?

9 CDC[MR. COOMBS]: No, Your Honor.

10 TC[MAJ FEIN]: No, Your Honor.

11 MJ: All right, Court is in recess.

12 [The Article 39(a) session recessed at 1608, 19 July 2012.]

13 [END OF PAGE]

1 [The Article 39(a) session was called to order at 1028, 28 August  
2 2012.]

3 MJ: This Article 39(a) session is called to order. Trial  
4 Counsel, please account for the parties.

5 TC[MAJ FEIN]: Your Honor, all parties present when the Court  
6 last recessed are again present. In addition to those parties, Ms.  
7 Carolyn Salazar, from the Office of Military Commissions, is here  
8 detailed as a court reporter and has been previously sworn.

9 MJ: All right. Thank you. I'd like to begin, today, by going  
10 over what has transpired since the last Article 39(a) session that we  
11 held in July. Why don't we begin by having the government describe  
12 what has gone on with respect to the extraordinary writ with the  
13 Court of Appeals for the Armed Forces?

14 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, on--excuse me. The  
15 Court of Appeals for the Armed Forces ordered the United States  
16 Government Appellate Division, United States Army, to provide all  
17 material or information filed in this case, including the docket  
18 sheet, all motions and responses thereto, all rulings and orders, and  
19 a verbatim transcript for recordings of all conferences and hearings  
20 that occurred in this court-martial on the 24th of July 2012. That  
21 order was sent down through the Government Appellant Counsel to the  
22 prosecution who then informed the Court and the defense. Pursuant to  
23 that order, the court reporters transcribed the relevant portions of

1       the sessions and provided those transcripts to both the prosecution  
2       and defense who authenticated the transcript, presented it to the  
3       Court, who, in turn, authenticated the transcript and sent that  
4       transcript up to the Court of Appeals for the Armed Forces.

5           MJ: All right. So, that is currently pending at the Court of  
6       Appeals for the Armed Forces, is that correct?

7           TC[MAJ FEIN]: Yes, ma'am, it is.

8           MJ: And as far as the Court knows, there is no stay that has  
9       been issued?

10          TC[MAJ FEIN]: That is correct, Your Honor.

11          MJ: Mr. Coombs, do you have anything to add?

12          CDC[MR.COOMBS]: No, Your Honor.

13          MJ: All right. Government, why don't you also give me the  
14       status of the panel member questionnaire?

15          TC[MAJ FEIN]: Yes, Your Honor. Appellate Exhibit 275 is the  
16       final questionnaire approved by the Court during the time between the  
17       last session and this session and, pursuant to the Court's order via  
18       email on 20 July 2012, the United States will send out this  
19       questionnaire on 4 September, after the Labor Day weekend, with a  
20       suspense of 21 September to have all panel members that are still  
21       currently on the United States Army Military District of Washington  
22       panel to fill out that questionnaire and get it back to the  
23       government to provide to the defense and the government and Court.

1 MJ: All right. I believe in that email I also asked the  
2 government to inquire as to whether there would be a change--an  
3 overall change in the convening orders resulting from the summer PCS  
4 season.

5 TC[MAJ FEIN]: Yes, ma'am, and the--there will not--there is not  
6 a projected change--any panel member changes to the convening order  
7 would likely occur after the new year.

8 MJ: All right. Thank you. Mr. Coombs, do you have anything to  
9 add?

10 CDC[MR.COOMBS]: No, Your Honor.

11 MJ: All right. Now, before we get into what has transpired  
12 with respect to discovery, I do want to address the telephonic R.C.M.  
13 802 conference that was held between myself and the parties on the  
14 27th of July of 2012. That telephonic R.C.M. 802 conference was at  
15 the request of the defense. The defense filing for their Article 13  
16 motion was due on the 27th of July of 2012. On the 26th of July  
17 2012, the government disclosed to the defense 84 emails that the  
18 government determined were material to the preparation of the defense  
19 with respect to their Article 13 motion. Now, as I said earlier,  
20 what an R.C.M. 802 conference is is where I meet with counsel, either  
21 physically or telephonically, to discuss scheduling or other  
22 logistics issues in the case and we put what transpired at the R.C.M.

1 802 conference on the record at the next hearing. Mr. Coombs, would  
2 you like to shed any more detail on the R.C.M. 802 conference.

3 CDC[MR.COOMBS]: Ma'am, just to highlight, then--based upon the  
4 802 conference, the defense filed a motion for a continuance; it's  
5 Appellate Exhibit 231. And the motion detailed the factual account  
6 that the Court just gave, in addition to the fact that Major Fein had  
7 delivered the emails--or gave notice of the emails to the defense on-  
8 -at 7:50 on the evening of the 26th of August. Then, approximately  
9 an hour and a half later, the defense received the 84 emails. The  
10 government had indicated that they had possession of the emails for  
11 approximately 6 months but had not looked at them until the 25th of  
12 August, just a day before the Article 13 motion was due. Based upon  
13 reviewing the emails, it was clear to the defense that the emails  
14 would be vital to our Article 13 motion because they indicate other  
15 individuals being involved in the classification determinations and  
16 custody status of PFC Manning. So, based upon that, we requested the  
17 Court grant a continuance of when we would have to file our  
18 supplemental Article 13 motion. We still went ahead and filed our  
19 Article 13 motion as scheduled on the 27th and then the Court granted  
20 the continuance which is in Appellate Exhibit 232.

21 MJ: All right. Thank you. Major Fein, would you like to add  
22 anything?

1       TC[MAJ FEIN]: Not in reference to the 802, ma'am. I think a  
2 lot of the facts that led up to those emails will come later during  
3 the litigation over the emails and the motion to compel discovery.

4       MJ: All right. I'm sorry, this is Appellate Exhibit--for the  
5 record, the Court ruled in Appellate Exhibit 232 on the defense  
6 request for continuance on the 1st of August 2012 as follow:

7                  On 27 July 2012, the defense requested the following  
8 adjustments to the case calendar based on the government's 26 July  
9 2012 disclosure of 84 emails germane to the preparation of the  
10 defense Article 13 motion that was due to the Court on 27 July 2012:

11                  a. Initial Article 13 motion, no change.

12                  b. Defense second request for Article 13 witnesses due on  
13 the 15th of August 2012.

14                  c. Government objection to defense request for Article 13  
15 witnesses, if any, due on the 22nd of August 2012.

16                  d. Defense supplemental Article 13 motion due on the 24th  
17 of August 2012.

18                  e. Defense supplement to compel Article 13 witnesses, if  
19 any, due on the 24th of August 2012.

20                  f. Article 39(a) session for Article 13 witnesses and  
21 other issues, 28 through 30 August 2012.

22                  g. Government response to defense Article 13 and  
23 supplemental Article 13 motion, 7 September 2012.

1                   h. Defense reply to government response to Article 13  
2 motion, 14 September 2012.

3                   i. Article 39(a) to litigate the Article 13 motion, 1  
4 through 5 October 2012.

5                   The defense also requested the Article 39(a) sessions and  
6 filing deadlines currently scheduled to be continued for 2 weeks and  
7 that all speedy trial filing deadlines be continued for 2 weeks. The  
8 court calendar set 27 July 2012 as the filing deadline for the  
9 defense Article 13 motion. The motion was scheduled to be litigated  
10 during the 27 through 31 August 2012 Article 39(a) session. On 26  
11 July 2012, the government disclosed 84 emails, obviously material to  
12 the preparation of the defense Article 13 motion.

13                  Mr. Coombs notified the Court prior to 27 July 2012 that he  
14 would be out of the country from 27 July 2012 through 9 August 2012.

15                  Upon receiving the emails from the government, the night  
16 before the Article 13 motion was due to the Court, the defense sent  
17 an email to the Court advising that the defense would need more time  
18 to incorporate the information gleaned from the 84 emails into its  
19 Article 13 motion and to identify and interview additional witnesses  
20 for the Article 13 motion. The government opposed the defense email  
21 request for a continuance. The series of emails exchanged between  
22 the parties and the Court on 27 July 2012 are attached to this order.

1                 The Court held a telephonic R.C.M. 802 conference with the  
2 parties on 27 July 2012 to address the defense request for  
3 adjustments to the trial schedule. Captain Overgaard represented the  
4 government, Mr. Coombs represented the defense. The parties and the  
5 Court arrived at the following mutually agreeable case calendar:

6                 One, Article 13 motion response reply, no change.

7                 Two, defense second request for Article 13 witnesses: 15  
8 August 2012, defense request; 22 August 2012, government objections;  
9 24 August 2012, defense motion compel; 28 through 30 August 2012,  
10 Article 39(a) session reduced from 5 to 3 days due to Article 13  
11 litigation continuance.

12                 Three, defense supplemental Article 13 motion: 24 August  
13 2012, defense filing; 7 September 2012, government response; 14  
14 September 2012, defense reply; 1 through 5 October 2012, Article  
15 39(a) to litigate Article 13.

16                 Four, the Article 39(a) sessions and filing deadlines  
17 currently scheduled to begin on 15 October and 27 November are each  
18 continued for two weeks. The Article 39(a) schedule set to begin 7  
19 through 11 January 2013 is continued 1 week. The final motions  
20 session scheduled to begin on 30 January 2012 will remain as  
21 scheduled, thus the following dates are scheduled:

22                 Article 39(a)s: 27 through 30 August 2012; 1 through 5  
23 October 2012; 29 October through 2 November 2012; 10 through 14

1 December 2012; 14 through 18 January 2013; and 28 and 29 January  
2 2013.

3 The trial dates will begin with voir dire on 30 and 31  
4 January 2013 and 4 through 22 February 2013 for the trial. The Court  
5 ordered the government to produce a draft case calendar reflecting  
6 the above changes. After the telephonic R.C.M. 802 conference, the  
7 government raised concerns regarding suspense dates for M.R.E. 505(h)  
8 notice, witness lists, reciprocal discovery, accused's plea and forum  
9 selection, notice of defense lack of mental responsibility, and  
10 disclosure of R.C.M. 914 material. The government also advised the  
11 Court that the presidential inauguration period, scheduled 15 through  
12 24 January 2012 [sic], will cause logistics and administrative issues  
13 if proceedings for this case are scheduled during that period.

14 Ruling: The defense motion for continuance is granted and  
15 scheduled as set forth above. The court calendar is adjusted as  
16 agreed to by the parties during the telephonic R.C.M. 802 conference.  
17 During the 28 to 30 August 2012 Article 39(a) session, the parties  
18 and the Court will review the case calendar, once again, and make any  
19 necessary adjustments to suspense date, Article 39(a) dates, and  
20 trial dates. So ordered this 1st day of August 2012.

21 All right, and, in accordance with that ruling, I just  
22 announced a number of dates that are going to take place. The  
23 parties and I will also be going in reviewing that case calendar as

1 we will continue to do through these proceedings to make necessary  
2 adjustments. So, that's the schedule currently on the books, but as  
3 with all trials, sometimes these things can change, so the Court will  
4 announce any changes to the case calendar should there be any.

5 Does either side desire to supplement that?

6 CDC[MR.COOMBS]: No, Your Honor.

7 TC[MAJ FEIN]: No, Your Honor.

8 MJ: All right. The Court is going to have the government go  
9 through what's transpired with discovery and due diligence. However,  
10 before you do that, the Court--I do want to read one ruling that the  
11 Court made shortly after the last Article 39(a) session with respect  
12 to the FBI impact statement.

13 Under Military Rule of Evidence 505(g)(2), the government  
14 requested a substitution. That ruling is dated 19 July 2012 and is  
15 at Appellate Exhibit 274. The government filed an *ex parte* motion  
16 for an *in camera* review by the Court in accordance with Military Rule  
17 of Evidence 505(g)(2)--"ex parte" means that the government files it  
18 by themselves, "*in camera* review" means that I review in chambers--to  
19 determine whether limited, voluntary disclosure by a proposed  
20 government substitution for the classified FBI impact statement shall  
21 be disclosed to the defense, or whether disclosure of the classified  
22 information, itself, is necessary to enable the accused to prepare  
23 for trial. The government prepared a redacted filing for the

1 defense. The defense avers that the FBI impact statement should be  
2 discoverable under *Brady*, R.C.M. 701(a)(6), and as material to the  
3 preparation of the defense to the extent relevant and necessary for  
4 production under R.C.M. 703(f).

5 The Court has conducted an *in camera* review of the  
6 classified information, considering the factors requested by the  
7 defense in its 6 July 2012 submission which the considerations are:

8 a. What is the extent of the redactions/substitutions?

9 b. Has the government narrowly tailored the substitutions  
10 to protect the government interest that has been clearly and  
11 specifically articulated?

12 c. Does the substitution provide the defense with the  
13 ability to follow up on leads that the original document would have  
14 provided?

15 d. Did the substitutions accurately capture the  
16 information within the original document?

17 e. Is the classified evidence necessary to rebut an  
18 element of the 22 charged offenses, bearing in mind the government's  
19 very broad reading of these many offenses?

20 f. Does the summary strip away the defense's ability to  
21 accurately portray the nature of the charged leaks?

22 g. Do the substitutions prevent the defense from fully  
23 examining witnesses?

1                   h. Do the substitutions prevent the defense from exploring  
2 all avenues of impeachment?

3                   i. Does the government intend to use any of the  
4 information from the damage assessments? If so, is this information  
5 limited to the summarized document provided by the government? If  
6 the information intended to be used by the government is not limited  
7 to the summarized document, does the defense, in fairness, need to  
8 receive the classified portions of the document to put the  
9 government's evidence in proper context?

10                  j. Does the original classification--classified evidence  
11 present a more compelling sentencing case than the proposed  
12 substitutions by the government?

13                  k. Do the proposed substitutions prevent the defense from  
14 learning the names of potential witnesses?

15                  l. Do the substitutions make sense such that the defense  
16 will be able to understand the context?

17                  m. Is the original classification evidence--classified  
18 evidence necessary to help the defense in formulating defense  
19 strategy or making important litigation decisions in the case?

20                  n. Is it unfair that the government has access to the  
21 unclassified version of the damage assessment and the defense did  
22 not? Does that provide a tactical advantage to the government? The  
23 government substitute is a redacted version of the original that

1 discloses *Brady* and R.C.M. 701(a)(6) material. The government  
2 advised the Court that nothing in the FBI impact statement that has  
3 not been disclosed to the defense will be used by the government or  
4 by any government witness during any portion of the trial. As such,  
5 the remainder of the FBI impact statement is not material to the  
6 preparation of the defense or necessary and relevant for production  
7 under R.C.M. 703(f). The FBI impact substitution meets the  
8 government's discovery obligations under *Brady* and R.C.M. 701(a)(6)  
9 to disclose evidence tending to reasonably negate the guilt of the  
10 accused to an offense charged, reduce the degree of guilt to an  
11 offense charged, or reduce the punishment. The government is ordered  
12 that no portion of the FBI impact statement not disclosed to the  
13 defense will be used by the government or any government witness  
14 during any portion of the trial. This includes rebuttal, rule of  
15 completeness, and sentencing, if the defense introduces or references  
16 anything in the substitution. The substitution is sufficient for the  
17 defense to adequately prepare for trial and represents an appropriate  
18 balance between the right of the defense to discovery and the  
19 protection of specific national security information.

20                   Ruling: The classified motion by the government to  
21 voluntarily provide limited disclosure under M.R.E. 505(g)(2) for the  
22 FBI impact statement is granted. Ordered this 19th day of July 2012.

1               All right. Government, why don't you lay out, for the  
2 record, what has transpired with due diligence and discovery since  
3 the last Article 39(a) session?

4               TC[MAJ FEIN]: Yes, Your Honor. Your Honor, first, on 25 July  
5 2012, what has been marked as Appellate Exhibit 264, the government  
6 filed the *ex parte* due diligence filing. Next, Your Honor, on the  
7 same day, 25 July 2012, what's been marked as Appellate Exhibit 272,  
8 the government provided notice to the Court, under the Motion to  
9 Compel Discover (2). That notice, pursuant to the Court's previous  
10 order, dated 22 June 2012, provided notice specifically on the update  
11 or status of the Headquarters, DA; Department of Defense; CENTCOM,  
12 DISA; and SOUTHCOM records; CID records; DIA records; and US Cyber  
13 Command records.

14               Your Honor, next, on the same date, 25 July 2012, what has  
15 been marked as Appellate Exhibit 226, the government filed the motion  
16 for leave for non-military entities, specifically ODNI, Department of  
17 Homeland Security, and the Central Intelligence Agency records that  
18 would fall under the Motion to Compel Discovery Number 2.

19               On the following day, 26 July 2012, the defense filed a  
20 response and that is marked as Appellate Exhibit 227.

21               MJ: And the government motion was Appellate Exhibit----

22               TC[MAJ FEIN]: I'm sorry, Your Honor, 226. Your Honor, based  
23 off instructions from the Court via email, I've provided more detail

1 accounting of why certain aspects of the request needed more time.  
2 These agencies--the government filed a supplemental motion for leave  
3 on 31 July 2012 and that has been marked as Appellate Exhibit 228,  
4 and that is in reference to ODNI, DHS, and CIA.

5 Following that filing, on 1 August 2012, the defense filed  
6 a response to the supplemental motion for leave and that is marked as  
7 Appellate Exhibit 229. On 1 August 2012, at Appellate Exhibit 230,  
8 the Court ruled granting the government's delay until 14 September  
9 2012 for records found at the ODNI, DHS, and CIA.

10 MJ: All right. For the record, let me stop you now. I'll go  
11 ahead and announce that ruling of the Court.

12 Ruling: Government Request for Leave until 14 September  
13 2012 to Provide Notice Disclosure of Certain Documents. The  
14 government requests leave of the Court until 14 September 2012 for  
15 the following:

16 1. To disclose files not subject to the Court's 22 June  
17 2012 order which may contain discoverable material, if any, to the  
18 defense or to the Court for *in camera* review in accordance with  
19 R.C.M. 701(g)(2) or Military Rule of Evidence 505(g)(2); or

20 2. If necessary, to notify the Court with a status of  
21 whether the United States anticipates the custodian of classified  
22 evidence will claim a privilege in accordance with Military Rule of  
23 Evidence 505(c) for the classified information under that entity's

1 control and file notice in accordance with M.R.E. 505(i)(2). The  
2 reason cited by the government for the request is that the majority  
3 of information is classified above the Secret level requiring  
4 additional time to obtain review and approval required prior to  
5 disclosure of the information. Defense opposes.

6 On 26 July 2012, the Court ordered the government to file a  
7 supplemental pleading stating, with particularity, the review and  
8 approval procedures required prior to disclosure of information  
9 classified above the Secret level and how that differs from the  
10 review and approval procedures required prior to disclosure of  
11 information at or below the Secret level. Both parties filed  
12 supplemental responses. Having considered the filings of the  
13 parties, the Court rules as follows:

14 1. The information at issue in this request is information  
15 classified at the Secret or above-Secret level that is owned by the  
16 Central Intelligence Agency (CIA), the Department of Homeland  
17 Security (DHS), and the Office of the Director of National  
18 Intelligence (ODNI), and possibly information falling within the  
19 Foreign Intelligence Surveillance Act (FISA). Further, on 19 July  
20 2012, the defense submitted a discovery request for additional CIA  
21 information. The discovery request was classified above the Secret  
22 level or containing specialized control measures.

1                   2. The government has advised the Court that it  
2 anticipates completing its review of the information owned by DHS and  
3 CIA by 27 July 2012, to include information responsive to the  
4 defense's 19 July 2012 discovery request. The government further  
5 advised the Court it will not be able to complete its review and  
6 obtain appropriate approvals by 3 August 2012, the date set forth by  
7 the court calendar, because the majority of the information is  
8 classified above the Secret level, contains special control measures,  
9 or requires inter-agency coordination.

10                  3. This is a complex case involving hundreds of thousands  
11 of classified documents that are potentially discoverable. There are  
12 statutory and regulatory requirements as well as inter-agency  
13 coordination processes the government must meet in order to disclose  
14 discoverable classified information to the defense. The rules in  
15 M.R.E. 505 recognize the special procedure required for disclosure of  
16 classified information. Accordingly, the reasons identified by the  
17 government and the time periods are reasonable.

18                  Ruling:

19                  1. Upon receipt of agency approval to disclose  
20 discoverable classified information to the defense or to the Court,  
21 in accordance with R.C.M. 701(g)(2) or M.R.E. 505(g)(2), the  
22 government will immediately disclose that information to the defense  
23 and/or to the Court.

1                   2. Except as provided in (1), above, the government  
2 request for leave until 14 September 2012 is granted. So ordered  
3 this 1st day of August 2012.

4                   Now, Major Fein, what is the status of that information at  
5 this time?

6                   TC[MAJ FEIN]: Your Honor, both--or all three, ODNI, Department  
7 of Homeland Security, and the CIA are working to meet the Court's  
8 suspense. The government does not anticipate any issues meeting the  
9 14 September suspense. And along with that update, Your Honor,  
10 previously approved--or pursuant to the Court's previous order, dated  
11 19 July, the Department of State also does not anticipate any issues  
12 with meeting the 14 September suspense.

13                  MJ: All right. And in your earlier notification, in Appellate  
14 Exhibit 272, the files for HQDA, DoD, CENTCOM, DISA, and SOUTHCOM--  
15 what is the status of that--the prosecution notification to the  
16 Court, dated 20 July 2012?

17                  TC[MAJ FEIN]: Yes, Your Honor. May I have a moment, Your  
18 Honor?

19                  MJ: Yes.

20                  TC[MAJ FEIN]: Your Honor, in reference to the Headquarters, DA,  
21 Department of Defense, CENTCOM, DISA, and SOUTHCOM document, all of  
22 those documents have either been disclosed to the defense through

1       classified discovery or made available to the defense in classified  
2       discovery.

3           MJ: All right.

4           TC[MAJ FEIN]: As far as information from the Defense  
5       Intelligence Agency (DIA)--those, I'll get to in a moment, Your  
6       Honor--but are--have been--separate motions have accounted for that.  
7       And, as far as U.S. Cyber Command, those documents, Your Honor, have  
8       either been turned over on classified discovery or been made  
9       available to the defense in classified discovery.

10          MJ: All right. Thank you.

11          TC[MAJ FEIN]: Your Honor, on 3 August 2012 the government  
12       filed a Military Rule of Evidence 505(g)(2) limited disclosure motion  
13       for the CIA, DIA, FBI, and NCIX. Respectively, those are marked as  
14       Appellate Exhibit 265 for the CIA, 266 for the FBI, 267 for NCIX, and  
15       263 for DIA.

16          MJ: May I see those, please?

17          TC[MAJ FEIN]: Your Honor, the original of these filings are all  
18       classified.

19          MJ: Oh.

20          TC[MAJ FEIN]: The government also did produce, pursuant to the  
21       Court's previous order at Appellate Exhibit 252, the unclassified,  
22       redacted versions.

23          MJ: All right. Let me see that, then.

1           TC[MAJ FEIN]: That's Appellate Exhibit 252.

2           MJ: All right. I'm looking at Appellate Exhibit 252. Thank  
3 you.

4           TC[MAJ FEIN]: And, Your Honor, the defense's response is dated  
5 21 August 2012 and it is marked as Appellate Exhibit 253.

6           MJ: All right. And this refers to substitutions for the FBI  
7 file, the ONCIX damage assessment, DIA records, and the CIA report,  
8 is that correct?

9           TC[MAJ FEIN]: That is correct, Your Honor, but, specifically,  
10 from the--since we just spoke about it--for the CIA and for DIA, it  
11 is material that did not require additional approvals based off the  
12 continuance as previously put on the record.

13           MJ: Say that one more time.

14           TC[MAJ FEIN]: Yes, Your Honor. The filing that occurred on 3  
15 August 2012----

16           MJ: Yes.

17           TC[MAJ FEIN]: ----from the CIA and--from material from the CIA  
18 and from DIA was for material that was at the Secret level and not at  
19 a higher or more controlled classification level.

20           MJ: All right. So, out of these records, at this time, what  
21 has been turned over to the defense? What remains outstanding?  
22 What's the status of each of them?

1           TC[MAJ FEIN]: Yes, Your Honor. For the information that--  
2 pursuant--or for Appellate Exhibit 265, the CIA, that is going to be  
3 taken up with the Court during an *ex parte* classified session. For  
4 the information with DIA, similarly, that information will be taken  
5 up in an *ex parte* session with the Court. For the FBI, Your Honor,  
6 on 21 August 2012, the Court issued a ruling that's been marked as  
7 Appellate Exhibit 254. That order--that--excuse me, that ruling  
8 directed the government to provide more information to the Court in  
9 reference to that filing on 3 August. None of that information that  
10 is redacted from the FBI has been disclosed to the defense pursuant  
11 to this litigation.

12          MJ: All right. Before we proceed, the Court did issue a ruling  
13 on that on the 21st of August 2012 as follows:

14           On 22 June 2012, this Court rules granting the Defense  
15 Motion to Compel Discovery 2 for the FBI files, minus the grand jury  
16 testimony, related to the accused to the extent relevant to an  
17 investigation of PFC Manning. On 3 August 2012, the government filed  
18 an *ex parte* classified motion for this Court to conduct an *in camera*  
19 review of the proposed redactions to the FBI file pertaining to the  
20 accused and to authorize limited disclosure in accordance with M.R.E.  
21 505(g)(2). The Court has reviewed the FBI file and the proposed  
22 redactions and has determined this order is necessary for the Court  
23 to conduct the M.R.E. 505(g) review of FBI file.

3                   1. Identify, numerically, each proposed redactions by  
4 Bates number and provide the Court with justification for each  
5 proposed redactions. The same redactions on multiple pages may be  
6 addressed together.

7               2. Identify what each proposed redaction--whether each  
8 proposed redaction has been made available to the defense and  
9 discovery from another source and identify the source.

10 So ordered this 21st day of August 2012.

11 All right. And with respect to the ONCIX damage  
12 assessment, the Court also made the following ruling on the 23rd of  
13 August 2012:

On 3 August 2012, the government filed a classified motion moving the Court to conduct an *ex parte* review the damage assessment prepared by the Office of National Counterintelligence Executive (ONCIX) and to authorize redactions of classified information from a damage assessment in accordance with M.R.E. 505(g)(2). The Court conducted an *in camera* review of both the damage assessment and the proposed redactions. In coming to this ruling, the Court has considered the factors requested by the defense and it's 21 August 2012 submissions. Those are the same factors I read with respect to the older ruling.

1               The ONCIX damage assessment remains in draft, however, no  
2 substantive changes are anticipated. The government will keep  
3 apprised of any changes to the damage assessment and notify both the  
4 Court and the defense of any substantive change to it.

5               The Court has advised--the government has advised the Court  
6 that nothing redacted will be used by the government during any  
7 portion of the trial.

8               The ONCIX damage assessment, as redacted, meets the  
9 governments discovery obligations under *Brady* and R.C.M. 701(a)(6) to  
10 disclose evidence tending to reasonably negate the guilt of the  
11 accused to an offense charged, reduced the degree of guilt to an  
12 offense charged, or reduce the punishment. The ONCIX damage  
13 assessment, as redacted, also provides the defense with evidence that  
14 is material to the preparation of the defense and relevant and  
15 necessary for production in accordance with M.R.E. 703(f).

16               The redacted ONCIX damage assessment is disclosed to the  
17 defense almost in its entirety. Redacted information not disclosed  
18 to the defense is not favorable, material to the preparation of the  
19 defense, or relevant and necessary for production under R.C.M.  
20 703(f). The government has ordered that no portion of the ONCIX  
21 damage assessment not disclosed to the defense will be used by the  
22 government or any government witness during any portion of the trial.

1 This includes rebuttal and Rule of Completeness if defense introduces  
2 a references anything in the substitution.

3 The substitution is sufficient for the defense to  
4 adequately care for trial and represents an appropriate balance  
5 between the right of the defense to discovery and the protection of  
6 the specified identified national security information.

7 Ruling: the classified motion by the government to  
8 voluntarily provide limited disclosure under M.R.E. 505(g)(2) for the  
9 ONCIX damage assessment is granted.

10 Ordered this 23rd day of August 2012.

11 And, Major Fein, that was at Appellate Exhibit what?

12 TC[MAJ FEIN]: Yes, Your Honor, it's marked as Appellate Exhibit  
13 255.

14 MJ: Okay. Please continue.

15 TC[MAJ FEIN]: Yes, Your Honor. We left off on the list, Your  
16 Honor, on 3 August 2012. On that date, the government provided  
17 notification to the defense of its proposed--or its intended  
18 procedures under R.C.M. 914 Jencks that has been marked as Appellate  
19 Exhibit 270. By way of background, for the record, Your Honor, in an  
20 email from the Court to the parties, dated 26 July 2012, the Court  
21 laid out the following timeline for R.C.M. 914 Jencks disclosures and  
22 filings. On 3 August 2012, the government will notify the defense in  
23 writing what types of pretrial statements the government intends to

1 disclose to the defense in accordance with R.C.M. 914. 17 August  
2 2012, the defense didn't take issue with the scope of the government  
3 notice filing or motion. 22 August, government replied [inaudible].

4 So, again, on 3 August, the government filed the disclosure  
5 and then on 17 August the defense did not file any notice to the  
6 Court that they take issue. The ultimate substance of the procedures  
7 outlined, Your Honor, on page 2, is that the prosecution proposes the  
8 following processes: search for, preserve, and disclose material  
9 under R.C.M. 914.

10 [a.] For all witnesses, the prosecution will search its  
11 records and will request the investigative agencies search their  
12 records for any statements that the prosecution reasonably expects  
13 will relate to the subject matter of each witness's anticipated  
14 testimony on direct examination. The prosecution will disclose such  
15 statements in accordance with the filing date set by the Court.

16 b. For any potential rebuttal witness, the prosecution  
17 will preserve any applicable statements and timely disclose those  
18 statements under R.C.M. 914, should the witness testify.

19 Your Honor, on 17 August 2012, what is marked as Appellate  
20 Exhibit 257, the government filed--excuse me, Your Honor. On the  
21 same date, what is marked as Appellate Exhibit 268, the government  
22 filed an *ex parte* Military Rule of Evidence 505(g)(2) limited  
23 disclosure motion for DIA material that's classified above the Secret

1 level or controlled in a special manner. Additionally, on that date,  
2 what is marked as Appellate Exhibit 257, the government also provided  
3 the redacted and unclassified version to the defense and that has  
4 been marked, as I said, Appellate Exhibit 257.

5 Your Honor, that finishes the portion of all the different  
6 filings that have occurred up since the last session and, just to  
7 roll up all the different material that has been disclosed since the  
8 last session, the NSA has material that has been made available to  
9 the defense, the National Ground Geo-Spatial Agency and other DoD and  
10 joint--South--documents have either--have been produced in classified  
11 discovery or made available for inspection, and miscellaneous federal  
12 agency documents have been provided to the defense in classified  
13 discovery.

14 MJ: All right. So what's still outstanding?

15 TC[MAJ FEIN]: Yes, Your Honor. Outstanding, first, is the FBI  
16 investigative file redactions pending the order and the date of 14  
17 September; two different M.R.E. 505(g)(2) filings for DIA information  
18 which will be taken up in an *ex parte* session with the Court to meet  
19 with the government; CIA material that is--have already been filed as  
20 part of M.R.E. 505(g)(2) which will be taken--or which will be dealt  
21 with at the same *ex parte* session; there is also CIA material  
22 pursuant to the due date of 14 September 2012; ODNI material that is  
23 due to be disclosed for a filing on 14 September 2012; Department of

1 State material that is due to be disclosed for a filing by 14  
2 September 2012; and, finally, Your Honor, the Department of Homeland  
3 Security material with the same due date of 14 September 2012.

4 MJ: All right. Is there anything further on discovery from the  
5 government?

6 TC[MAJ FEIN]: There is, I guess, one last one, Your Honor. Now  
7 the Court has ruled for the NCIS damage assessment, the government  
8 needs to make it available and will coordinate with the defense on  
9 where they need to go and who they need to contact.

10 MJ: All right. Mr. Coombs, anything from the defense?

11 CDC[MR.COOMBS]: Your Honor, the only caveat which will--  
12 depending upon what the restrictions are--we'll raise with the Court  
13 but--as part of our 505(h)(3) obligations, we have requirements to  
14 provide the Court with notice of what information we intend to  
15 disclose. Unfortunately, sometimes, due to the requirements placed  
16 upon access to the information, it makes it very difficult for the  
17 defense to coordinate with our experts as well as my military co-  
18 counsel and myself to get to a particular place at a particular time.  
19 In the past, the Court and the government has--I guess the government  
20 has accommodated, based upon the Court's request, access, here,  
21 during 39(a) sessions when there are court security officers or  
22 defense security officers present and all the parties are present.

1                   For the NCIS and for the other M.R.E. 505(g)(2) requests--  
2 or (g)(2) notices, the defense would request that similar access be  
3 provided, here, at the court. If Mr. Prather has to be present, that  
4 is fine with the defense. The goal, here, is to get timely access to  
5 the information so that we can provide timely notice under viable  
6 505(g)(2). Unless there is some reason why that's not sufficient, we  
7 would request that the government help with that request.

8                  MJ: All right. Major Fein, has the defense asked the  
9 government for that before the last minute?

10                 TC[MAJ FEIN]: Your Honor, the defense has asked for certain  
11 disclosures to be made available. The government is endeavoring and  
12 will continue to make as much available in the defense's work space  
13 or in temporary work space that's created. At this point, the few  
14 documents that have not been made available is simply because of  
15 their sensitivity and their classification, but there is an  
16 incredible amount that has been made available, both in classified  
17 discovery and for inspection. So, we'll continue to work on that,  
18 Your Honor.

19                 MJ: Okay. Thank you. To the extent you can do this for the  
20 relevant agencies--I mean, the Court understands the equities  
21 involved in the protection of national security information. If  
22 these agencies can provide whatever they need to do to make this  
23 courtroom area a place where such information can be reviewed, you do

1 have the entire defense team, the security experts, everybody  
2 available at one location. The Court is certainly willing to take  
3 recesses to accommodate such reviews during the Court's schedule. It  
4 would shave off a lot of the logistics and make this trial move along  
5 faster.

6 TC[MAJ FEIN]: Absolutely, Your Honor.

7 MJ: All right. Is there anything else we need to address from  
8 a house-keeping standard--or a house-keeping issue before we move on  
9 to the motions at issue for this Article 39(a) session?

10 CDC[MR.COOMBS]: No, Your Honor.

11 TC[MAJ FEIN]: No, Your Honor.

12 MJ: All right. The first motion we're going to address is the  
13 defense motion to amend the Court protective order. May I see the  
14 protective order?

15 ADC[MAJ HURLEY]: I have a copy, ma'am.

16 MJ: All right. It's Appellate Exhibit----

17 ADC[MAJ HURLEY]: It's Appellate Exhibit 32, from my count. I'm  
18 not reading my----

19 TC[MAJ FEIN]: Yeah.

20 ADC[MAJ HURLEY]: It's 16 March 2012, Appellate Exhibit 32,  
21 ma'am.

22 MJ: Okay. Is this an additional copy for me?

23 ADC[MAJ HURLEY]: Yes, ma'am, I just happen to have one.

1 MJ: Thank you. All right. Now, what provision is at issue?

2 ADC[MAJ HURLEY]: Ma'am, may I use the lectern?

3 MJ: Yes.

4 ADC[MAJ HURLEY]: I direct the Court's attention to paragraphs L  
5 and M.

6 MJ: All right.

7 ADC[MAJ HURLEY]: So the area of review, paragraph--and I'm just  
8 reading from my motion, ma'am--the defense requested that the--review  
9 the change to allow for the undersigned's current--or for my current  
10 office space as well as a neighboring--next door a higher than Secret  
11 facility. So, my office space is what's referred to as an "open  
12 Secret facility."

13 MJ: Okay. So, let's talk about--your office space is an open--  
14 your office space is where?

15 ADC[MAJ HURLEY]: My office space is in Arlington, Virginia,  
16 ma'am.

17 MJ: All right. And is a--what is it called?

18 ADC[MAJ HURLEY]: It's--the description of the facility is an  
19 open Secret facility. I work for the Office of the Chief Defense  
20 Counsel for the Military Commissions.

21 MJ: And what is an "open Secret facility"?

22 ADC[MAJ HURLEY]: Well, the way I would describe it, Your Honor,  
23 as not a security professional--but because it--there is a lock to

1 get in the facility, itself--and stop me anytime I transgress--  
2 because there's a lock--a combination lock to get into the facility,  
3 itself, that once you are in the facility, you are allowed open  
4 storage of classified information. So, it's not you get in the  
5 facility and you need to look at stuff and then put it away in the  
6 safe; it can remain out.

7 MJ: Now, you say, "open"--so, up to the Secret level?

8 ADC[MAJ HURLEY]: Yes, ma'am.

9 MJ: Okay. And you said something about your next door  
10 facility?

11 ADC[MAJ HURLEY]: Right. So, there are many offices--the Chief  
12 Defense Counsel for the Military Commissions has several different  
13 office locations; they're all right there close by to each other in  
14 Arlington, Virginia. And the next door facility for me--that's where  
15 the actual Chief Defense Counsel works--they have a higher than  
16 Secret facility, there, ma'am, where higher than Secret information  
17 can be stored, can be discussed openly--there's a conference room  
18 there--as well as classified telecommunications equipment,  
19 specifically, a classified telephone.

20 MJ: Now, your motion talks about equipment you have at your  
21 desk?

22 ADC[MAJ HURLEY]: Yes, ma'am, I have a desktop computer that's  
23 attached to the SIPRNET that I can--you know--I have a desktop----

1 MJ: What do you mean a "desktop computer that's attached to the  
2 SIPRNET"?

3 ADC[MAJ HURLEY]: Well, it's a--rather than a laptop computer,  
4 as the defense has been provided, it's a desk--it's a tower desktop  
5 computer--you know, the tower that's usually----

6 MJ: So, it's exclusively SIPRNET?

7 ADC[MAJ HURLEY]: Yes, ma'am.

8 MJ: Okay.

9 ADC[MAJ HURLEY]: And I use the same monitor, I just--there's a  
10 switch that I can flip to go from classified to unclassified and I  
11 have an unclassified laptop computer at my desk as well.

12 MJ: So your computer allows you to use a switch to switch  
13 between SIPR and NIPR?

14 ADC[MAJ HURLEY]: Yes, ma'am.

15 MJ: Is that standard computer packaging for----

16 ADC[MAJ HURLEY]: Yes, ma'am.

17 MJ: ----NIPR?

18 ADC[MAJ HURLEY]: It--or--when I say it's standard computer  
19 packaging, again, I can only go off the other systems that I've seen  
20 inside that office and everyone has a similar system.

21 MJ: All right. So, the--what you want to be changed--I've got,  
22 here, the area of review should be changed to include the--your

1 current office as well as the neighboring, higher than Secret  
2 facility?

3 ADC[MAJ HURLEY]: Yes, ma'am.

4 MJ: All right. And then, B, you want the restriction on  
5 copying classified documents, (1)(3), to be changed to allow you to  
6 print or copy classified documents provided by the government?

7 ADC[MAJ HURLEY]: Yes, ma'am, and----

8 MJ: All right, then, does that--under the supervision of the  
9 security officers?

10 ADC[MAJ HURLEY]: No, ma'am. I mean, if there are documents  
11 that are given to me by the government and I wish to have them in a  
12 hard copy form, what I'm asking the Court to do is amend its  
13 protective order to allow me to print it out.

14 MJ: Without security experts?

15 ADC[MAJ HURLEY]: And then store it in my office.

16 MJ: Without security experts?

17 ADC[MAJ HURLEY]: Yes, ma'am.

18 MJ: All right. So, you're saying that everybody should be  
19 allowed to do that or just you?

20 ADC[MAJ HURLEY]: Well, certainly, if Captain Tooman or Major  
21 [sic] Coombs were working in an open Secret facility, then they  
22 should be granted that access. It's my understanding that neither  
23 one of them are. Because I work in an open Secret facility, if

1 there's a document that I would want in a hard copy format because I  
2 would find it easier to read or for whatever administrative purpose,  
3 I would ask to be allowed to print that document out, to review, and  
4 then store it in that open Secret facility and move it, if necessary,  
5 with my courier card, anywhere in the National Capital Region.

6 MJ: All right. And then, if--the third one is (1)(4)?

7 ADC[MAJ HURLEY]: Yes, ma'am, to allow me to use my classified  
8 desktop computer, the one that's issued to me by the Chief, Defense  
9 Counsel for the Military Commissions, in furtherance of my  
10 responsibilities on the defense team in this case.

11 MJ: All right. Is there anything else?

12 ADC[MAJ HURLEY]: Yes, ma'am. There's been some dispute among  
13 the parties as to what the 16 March protective order, Appellate  
14 Exhibit 32, indicates in the next paragraph and that's where I would  
15 like some clarification from the Court. One, is to use my SIPRNET  
16 computer in furtherance of my representation of PFC Manning,  
17 specifically, to contact the government to--there's filings that I  
18 would need to--classified filings that I would want to serve on the  
19 government; I could use that system to do that--or to Mr. Prather--  
20 and that I would be able to use the SIPRNET without any supervision  
21 from the court security officer anywhere else.

22 MJ: All right. Now, there have been emails that have gone back  
23 and forth between the parties. I'm going to ask--Major Fein, I'm

1 going to--if you could just--I'm going to address both of you at,  
2 sort of, the same time, here. What is the government's position with  
3 respect to this motion, having gotten a filing on it? And I  
4 understand it wasn't part of the Court----

5 TC[MAJ FEIN]: Well, ma'am, the government is ready to proceed  
6 to discuss it. We were just hoping to--if you want to go down the  
7 list, quickly, Your Honor, first and foremost, area review, it's  
8 already been approved.

9 MJ: Okay, let's go down the list. Okay, so we're talking  
10 about----

11 TC[MAJ FEIN]: Well, first, as a point of clarification, Your  
12 Honor, the protective order that both parties negotiated, the Court  
13 signed and ordered, the "government facility" is the term that's used  
14 and it was purposely done that way so there's--it provides  
15 flexibility to define what those facilities are. The convening  
16 authority hasn't always defined those facilities. After Major Hurley  
17 moved into his new facility and Captain Tooman moved from Fort  
18 Leavenworth, the government went to the convening authority and,  
19 since the end of July, has been producing classified material to  
20 Major Hurley in a facility because it's approved. So, for his  
21 office, for secret material, we've already been delivering the  
22 material and it's approved. So, the very first issue has already  
23 been resolved.

1 MJ: Now, is there any--so is there any change necessary to the  
2 protective order to accomplish (a), in the defense motion?

3 TC[MAJ FEIN]: No, Your Honor, it's just what the definition of  
4 a government facility is has been--that has been defined by the  
5 convening authority on 26 July. Because we weren't--we quickly got  
6 this together, Your Honor, we can provide copies to the Court and  
7 defense--on 26 July, the convening authority, similar to the previous  
8 memos and approvals for the last 2 years, delineated exactly where  
9 material can and can't be stored. So, for the defense team, for  
10 Secret material, there are six locations that have been designated:  
11 the Fort Myer TDS Office, still; the Fort Belvoir TDS Office; the  
12 Fort Meade TDS Office; the Office of Military Commissions,  
13 specifically, Major Hurley's office, based off the request; the  
14 National--the Naval War College, for Mr. Coombs to go in his local  
15 area; and this courthouse at Fort Meade. So, for Secret material,  
16 everywhere the defense would go is, essentially, a place that can  
17 store it.

18 For any material that is higher than Secret, it has always  
19 been the convening authority's order that that would be stored with  
20 the security expert, Mr. Hall, at his office at INSCOM Headquarters,  
21 which is, itself, a large secure facility. So, there is a point of--  
22 right there is an issue on defining a government facility and what

1 has been approved and hasn't. For Secret material, this is a non-  
2 issue for the Court.

3 MJ: All right. Major Hurley, is there any issue with Secret  
4 material, having heard that?

5 ADC[MAJ HURLEY]: No, ma'am, I--the reason it was included in  
6 this particular motion was because of the phrasing. I wasn't a party  
7 to this negotiation that Major Fein is referring to. I thought that  
8 this government facility was a specific place to--based on the nature  
9 of the language. So, that's why I included it in this motion and I  
10 apologize for the delay.

11 MJ: All right. That's fine. All right, so the Secret material  
12 is going to Major Hurley's office--and, again, just to reiterate, I  
13 mean, the Court--when we initially negotiated this protective order,  
14 took great pains to balance the need to protect classified  
15 information--I certainly understand the equity-holders' interest in  
16 ensuring that this stays secure--with the defense, the government,  
17 and the Court's ability to do our jobs by not requiring this case to  
18 be so logistically onerous that we're spending all our time in cars  
19 driving from point A to point B.

20 TC[MAJ FEIN]: Yes, ma'am.

21 MJ: So, understanding those competing interests, let's see if  
22 we can get through and look at some of the rest of this. Now, what  
23 is the government's position on--well, with the above-Secret level

1 it's always been with the security officers who are located at  
2 INSCOM. Now, I have to go to these places to look at the above-  
3 Secret as well.

4 ADC[MAJ HURLEY]: Yes, ma'am.

5 MJ: So, why--I guess--what is the reason to have yours the  
6 right next-door?

7 TC[MAJ FEIN]: Well, ma'am, just for the--in order to avoid that  
8 logistical nightmare that you just described--that we wouldn't  
9 necessarily have to drive around. If there is a facility, there, and  
10 I have--or can be made to have exclusive use of a safe that's located  
11 in this secure facility, I would submit to the Court that, just for  
12 administrative convenience of defense counsel, that we be allowed to  
13 use that facility in order to store higher than Secret information.

14 MJ: What is the government's position with respect to that?

15 TC[MAJ FEIN]: A few, Your Honor. First and foremost, the  
16 government, as you've already stated, is concerned with  
17 accountability of classified information; that is the ultimate issue.  
18 Who's accessing it? Who has authority to access it? And who  
19 shouldn't be accessing it? So, to answer this specific question--  
20 this goes to what transpired over email--the government doesn't know  
21 what facility Major Hurley is referencing. We--or none of the  
22 government officials have gone to the commissions to see who else has  
23 access to that room or series of rooms--that conference room, what

1 information technology is in there that could allow someone have  
2 access that isn't authorized under the Court's protective order.  
3 Just in rattling off the list--it wasn't a part of the motion, we  
4 just found out from the defense without us really researching this  
5 and understanding it and the defense providing the information--  
6 there's classified phones there. The problem with classified phones  
7 being in a work area, Your Honor, is anyone who picks up the other  
8 end assumes the person on the other end has a need to know; that's  
9 how the system works. But, in this case, the Court's protective  
10 order regulates all classified material in this court-martial. So,  
11 if there's someone else who has access to it, the government's in a  
12 position to not know, so, therefore, we can't maintain  
13 accountability. So, the whole reason, originally, it was at a Top  
14 Secret or other information is stored at INSCOM Headquarters with  
15 security experts who are specifically trained to handle this  
16 material, is that they, then, are also responsible for the defense  
17 under the protective order.

18 MJ: So, all of the defense's above-Secret material--I mean are  
19 you--let me just make sure that I'm clear, here. The above-Secret  
20 material is stored by the--is stored in one place?

21 TC[MAJ FEIN]: Actually, Your Honor, I don't think there is any  
22 material other than notes, at this point, because all of the above-  
23 Secret material--and, Defense, please correct me--but all the above-

1 Secret material has only been made available for inspection purposes;  
2 notes, of course, go with the defense counsel. So, right now, we're  
3 talking about, I think, nothing. Again, it's--their notes and the  
4 notes--security experts have to be present anyways; everyone has  
5 courier cards. So, it goes back to accountability, Your Honor.

6 MJ: All right. So, what would a visit to this Office of  
7 Military Commissions do for the government?

8 TC[MAJ FEIN]: Well, it's not necessarily the prosecution  
9 visiting, Your Honor, it's really understanding what the capabilities  
10 are, how is this information properly secured in an area where no one  
11 else can have access to it? This same inquiry happened with Major  
12 Hurley when doing the research required to present this to the  
13 convening authority about his office. He has a safe only he and the  
14 security expert--the government confirmed with security--excuse me,  
15 not expert, but security personnel at the commissions said, "He has  
16 the access; no one else other than the security folks." Okay,  
17 therefore, no one else--Major Hurley's not there--can access the  
18 information; it's properly secure. That's the type of information  
19 the government would need in order to assess its--fully assess its  
20 position. But it goes back to--for the very sensitive material, it--  
21 security experts should be present for the majority of those material  
22 because of its sensitivity.

1 MJ: All right. Well, Major Hurley, with respect to the above-  
2 Secret material, I'm going to table that part of the ruling. Please  
3 work with Major Fein. I noticed during email traffic, you objected  
4 to having him come over to the office; change that. Let him come,  
5 let him look, let him see what he needs to see to get with the equity  
6 holders of this information. And, again, the Court is confident that  
7 with mutual good faith endeavors by both sides, maybe you can come up  
8 with something that's mutually agreeable. Again, balancing both  
9 interests; the protection of the national security versus the  
10 logistics for the defense counsel; I mean, these issues sometimes  
11 compete.

12 All right. So, (a) we're all set, (b) is--or above-Secret  
13 is basically tabled until this takes place.

14 TC[MAJ FEIN]: Yes, Your Honor.

15 MJ: Now, (b), what is the government's position on the  
16 restriction on copying classified documents?

17 TC[MAJ FEIN]: First, Your Honor, if we may take up printing?

18 MJ: Yes.

19 TC[MAJ FEIN]: If the defense--this should be modified if the  
20 interpretation is that the defense can't print what the government is  
21 giving them. We agree, it should be modified to allow that. The  
22 government even provided the defense three stand-alone laptops and a  
23 printer with the intent to print material. Really, what the focus of

1 this was replication of material once it's printed; again,  
2 accountability. If the defense is simply printing material and  
3 keeping it stored in the isolated area that is only for the defense  
4 and no one else can have access and they're accounting for it, even  
5 when they courier it using the normal courier rules, from point A to  
6 point B and accounting for it on DA 200s or whatever other forms,  
7 there should be no issue, here, with printing material or copying for  
8 internal use only.

9 MJ: So, the government's position is, then, that that would  
10 fall within the protective order as drafted?

11 TC[MAJ FETN]: No, Your Honor, I think there needs to be a  
12 modification.

13 MJ: And the government doesn't oppose that?

14 TC[MAJ FEIN]: We do not, Your Honor.

15 MJ: Okay. Is that--some language, maybe, during a recess, the  
16 two of you can work out?

17 TC[MAJ FEIN]: Yes, Your Honor.

18 MJ: Maybe just do an amendment to the protective order?

19 TC[MAJ FEIN]: Yes, ma'am.

20 MJ: Amendment 1? Okay. So, (b) is all set. And, Major  
21 Hurley, you heard with the government just described on the  
22 procedures and what you can and can't do when you print. Is that--  
23 are you in accord with that?

1           ADC[MAJ HURLEY]: Yes, ma'am.  
2           MJ: Okay. All right now, number--(c), I think this was the big  
3 one that began all this--was the SIPRNET computer for the defense.  
4 Now, my understanding from Major Fein is you've provided the--the  
5 government's provided the parties with special computers to use for  
6 this case, is that right?

7           TC[MAJ FEIN]: Yes, Your Honor. What originally happened back  
8 in November of 2010--excuse me, '11--was these computers were  
9 provided knowing there's this voluminous material and discovery  
10 that's classified in order for them to have full-access, defense team  
11 only computers that are stand alone--again, about accountability.  
12 The government already has a plan in place--post--if this has a post-  
13 trial process associated with this case to preserve the defense's  
14 material because--unfortunately, because it's classified, it's going  
15 to have to be preserved separately--all of that has been accounted  
16 for and that's why three stand alone computers were provided with  
17 print capability, courier cards for defense counsel to move the  
18 material. So, it was never originally contemplated that defense  
19 would be needing SIPRNET access--or a computer in their work place.

20           Now, the government understands the conditions have  
21 changed; Major Hurley went from one position to another that now  
22 provides him that access that never came up before. However, we  
23 still run into the accountability issue. The Office of Military

1 Commissions, to the best of our knowledge--because we don't know this  
2 information--has networked computers that others can have access to--  
3 can come into an office, like any other military office, and still  
4 log on to. Well, that's not ensuring the proper accountability and  
5 that's another reason why we acquired three stand alone laptops  
6 provided to the defense; there's always accountability of the  
7 material.

8 MJ: So, does Major Hurley have his own laptop?

9 TC[MAJ FEIN]: Your Honor, that is actually what we are asking  
10 the defense over emails--is to figure out why the system in place  
11 hasn't been working because no one--the defense has never told the  
12 prosecution, since they've had this material, that what they have  
13 isn't adequate. We don't know, Your Honor. We know that we signed  
14 over three classified laptops, a printer, and other material: a huge  
15 shredder, everything needed in order to, what we would argue,  
16 prosecute or defend a classified information case. But we do not  
17 know the status or why that's not happening.

18 MJ: Major Hurley, do you have a laptop from the government that  
19 has SIPR access?

20 ADC[MAJ HURLEY]: Do I, currently, have one in my possession?  
21 No, ma'am, I do not.

22 MJ: So, where is the defense laptop?

1           CDC[MR.COOMBS]: Ma'am, none of the laptops have SIPR access,  
2 so, as far as--they're just all stand alone computers, so, that's the  
3 problem. Like, in this instance, the government obviously has  
4 SIPRNET access and that created this issue here where my co-counsel  
5 had to hand-deliver our 505(h) (3) notice to the government and let  
6 the government use its SIPRNET access to file it with the court  
7 security officer. There should be no reason that we don't--in this  
8 instance, now that we have someone who as SIPRNET access, are not  
9 allowed to use that SIPRNET access to communicate with the Court,  
10 with the government, to file our filings. The government, here, now,  
11 is talking about securing our 505(h) (3) notice; that's the--we want  
12 to secure that and keep accountability of that. Well, SIPRNET access  
13 should suffice with regards to us filing it through SIPRNET. That  
14 should be sufficient for the government when it comes to controlling  
15 access to the information.

16          MJ: Yes, Major Fein, I guess that's where I'm a little bit  
17 confused. If it's going through SIPRNET channels in a government  
18 SIPRNET computer----

19          TC[MAJ FEIN]: Excuse me, Your Honor. I think we have a bunch  
20 of issues mixed up. First, the defense still hasn't answered where  
21 there are three classified laptops we've provided the defense and the  
22 printer and material--where that it; we still do not know that. It's  
23 about accountability----

1 MJ: Okay. Stop. Defense, do you have a classified laptop?  
2 CDC[MR.COOMBS]: Yeah, we have--I don't know why this is an  
3 issue. We have the three laptops, yes. We have a shredder, we have  
4 a printer. None of them have SIPRNET access. I mean, that's the  
5 issue that we're dealing with right now.

6 MJ: Okay. So, the--but they are SIPRNET-capable?

7 TC[MAJ FEIN]: No, Your Honor, they're not and the government's  
8 not alleging that either. And so, to clarify, they are Secret, stand  
9 alone laptops that have never been put on a Secret or any other  
10 network, but the Department of Defense has available----

11 MJ: So, you've given it to the defense so they can review  
12 information on that computer?

13 TC[MAJ FEIN]: To process, write motions, Your Honor, take  
14 notes, review information, whatever it is they need to do for this,  
15 except communicate. The government agrees they cannot communicate  
16 because it's not connected to a network.

17 MJ: What is the government's objection to defense communicating  
18 via SIPRNET?

19 TC[MAJ FEIN]: Actually, Your Honor, at this point, the  
20 government doesn't have an objection to the defense counsel using  
21 SIPRNET, but only under certain conditions and that's what we have to  
22 figure out. I go back to, Your Honor, the United States' position is  
23 it's about accountability. So, a mere filing--the government

1 actually doesn't have an objection to it, but there are processes in  
2 place for us to move that further, just like when the defense  
3 requested it during the negotiations on the protective order, the  
4 government went to the proper authorities, received authority for  
5 SIPRNET for the purposes of filing, amended that, again, once the  
6 Naval War College came into play. So, there is a system--just to go  
7 back, for the record, when the defense needed to file their 505(h)(3)  
8 notice, it's been on a calendar for months. The defense knew this  
9 was coming up and the Court's order had a process in place to follow  
10 which was use your government security experts--which also helps  
11 ensure there's not spillages--properly marked documents--use them,  
12 they file it; you're, essentially, at no greater disadvantage other  
13 than, of course, you don't have it at your desk. The government uses  
14 stand alone computers as well and has to use processes to move it  
15 onto a SIPRNET.

16 Now, granted, yes, the government does have access to  
17 SIPRNET in the government's office, but, again--so, overall,  
18 submitting filings over SIPRNET with a properly--what we would argue  
19 an amenable protective order that allows that, the government does  
20 not have an objection so long as other conditions can be met.

21 MJ: All right. Well, you're going to visit the defense office  
22 anyway, right?

23 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: So you can visit and, Major Hurley, you can show the  
2 government the stand alone--SIPRNET--have someone there that can  
3 explain who has access to it and all of the rest of that. So, I'm  
4 going to table this as well because I think, once again, if good  
5 faith, mutual negotiations--this may be something--if the government  
6 isn't opposed to the SIPRNET filing by the defense, this may be  
7 something that we can--you can look at and come to some mutually  
8 agreeable arrangement.

9 TC[MAJ FEIN]: Your Honor, may we have a moment?

10 MJ: Yes.

11 TC[MAJ FEIN]: Sorry, Your Honor, but that's actually not all  
12 the defense's motions is requesting the amendment of the protective  
13 order, Your Honor, and it's not just using SIPRNET for filing  
14 purposes or for communication between parties or communications  
15 between members of the defense team, they're also saying--requesting  
16 full SIPRNET access in furtherance of his lawful preparation for this  
17 trial with no supervision which the government interprets as full  
18 access to SIPRNET--the network, the internet--which then means  
19 there's classified material out there that isn't--that hasn't been  
20 approved or hasn't been put before the 505 process that defense could  
21 be accessing.

22 MJ: Is that what you're asking for, Major Hurley?

1           ADC[MAJ HURLEY]: Yes, ma'am. I'm asking--the defense requests-  
2 -and I would be the person to do it--complete access to the SIPRNET  
3 to do--to find anything. Now, if, in the course of using the SIPRNET  
4 for whatever reason--again, I can't imagine what it would be, ma'am,  
5 to be blunt, but if we find something that we decide that--the  
6 defense decides it wants to use, then we'll go through the 505  
7 process to----

8           MJ: Major Hurley, that's denied. You're not getting unfettered  
9 access to classified information on the SIPRNET. Okay. What else?

10          TC[MAJ FEIN]: May I have a moment, Your Honor?

11          MJ: Uh-huh.

12          TC[MAJ FEIN]: Your Honor, we will coordinate--the government  
13 will coordinate with the defense to do an inspection of the office  
14 with the right security folks. The only other thing--since we're  
15 still on the record--one, since receiving this motion on the 17th of  
16 August, the government has been trying to figure out the next step.  
17 So, one offer we might make is to allow SIPRNET email, but probably  
18 provide a separate laptop, that way the information can be controlled  
19 but all that will be figured out, Your Honor, on SIPRNET.

20          MJ: All right. And when you go to visit the office, if there's  
21 this separate computer, make sure it--well, let's--SIPRNET--do you  
22 have access to hook up a laptop to SIPRNET where you are?

1       ADC[MAJ HURLEY]: I'll have to talk with our information  
2 technology personnel, ma'am; I wouldn't know.

3       MJ: Okay. Well, the piece of the SIPRNET communications, see  
4 if the two of you can work out.

5       TC[MAJ FEIN]: Yes, ma'am.

6       MJ: Now, there were some disturbing things in the emails that  
7 went back and forth on--both sides questioning, I suppose, the good-  
8 faith of the other side in working through these issues. Now, Major  
9 Hurley, you gave a couple of examples; would you like to state them  
10 for the record?

11      ADC[MAJ HURLEY]: Well, ma'am, I can think of--well, the two  
12 examples that I can think of are--in attempting to understand some of  
13 the information--open certain of these files that the government had  
14 given to us in classified--to the defense in classified discovery. I  
15 had a question about how to open a particular file and without access  
16 to the actual Internet--to use the Internet tools that Microsoft has  
17 to let me open a document. I asked the legal administrator from the  
18 government side, Chief Ford, how I--if I could send him an email--  
19 classified--over the classified network to get some clarification and  
20 I was ultimately told that the government wasn't going to respond to  
21 me over a classified network to describe for me how that computer  
22 program--or how a computer program could be used to open the  
23 document.

1           The next instance, ma'am, I sent a test message to Major  
2 Fein and to Captain Morrow just to see if my SIPRNET connection was  
3 working--just to verify that it was working because I had--we had to  
4 go through the normal process to see if your email is working--and I  
5 just sent it, then, and there was no response from the government.

6           MJ: Okay. What's the government's position with respect to  
7 these two issues?

8           TC[MAJ FEIN]: Ma'am, first, the issue is how to un-encrypt our  
9 files, the same issue that all parties have had and Chief Ford did  
10 not respond to Major Hurley because he said, "You're asking for  
11 access to SIPRNET and you need to talk to Major Fein." What happened  
12 immediately after that, once we figured out what it was for, Chief  
13 Ford has helped the defense open up the encrypted files and helps  
14 anyone who calls on how to open the encrypted files. It was just not  
15 going to be done over SIPRNET.

16           MJ: Is that correct?

17           ADC[MAJ HURLEY]: Ma'am, I don't recall that--I just do not  
18 recall that--what Major Fein is saying.

19           MJ: Do you know how to open the files? Did Chief Ford----

20           ADC[MAJ HURLEY]: No, ma'am, I don't.

21           MJ: ----help you?

22           ADC[MAJ HURLEY]: There was no closure on the issue from the  
23 perspective of the defense counsel; the files are--remain unopened.

1           TC[MAJ FEIN]: Ma'am, the entire--so, if Major Hurley doesn't  
2 know, Your Honor, we send discovery--I think over a hundred  
3 productions to the defense in the last 2 years using the same  
4 process; the other defense counsel can use it. I go back to--it was  
5 sent over SIPRNET email and it was sent--and that's why--or it was  
6 asked for SIPRNET email addresses. Chief Ford simply said--I have  
7 all the emails to provide this, Your Honor. The email was from--  
8 excuse me. There are--on 14 August--excuse me, on 13 August, Major  
9 Hurley emailed Chief Ford and said, "Chief, I have a question on a  
10 couple CDs I have now. What's your SMIL email address so I can send  
11 those queries over to you (SIPRNET email address)?" Chief Ford sent--  
12 -replied and included me on the email, "Sir, please direct your  
13 questions to Major Fein, thank you," and provided my SIPRNET email  
14 address. And then I came on, on the same day, August 13th, and said,  
15 "Major Hurley, my SIPR email address is the following," and I  
16 repeated it, "however, under the current protective order, only the  
17 defense security experts are authorized to use SIPR for this case and  
18 only for filing purposes. All classified work is required to be  
19 completed on the three government-provided classified laptops that  
20 have been given to the defense or been in--excuse me, have been in  
21 the defense's possession since November 2011."

22           And then, on 14 August, Major Hurley asks for me to send  
23 him the Court's protective order that's been in place. So, Your

1 Honor, this is a little out of context because that was 14 August.  
2 If we go back, Your Honor, to the first time this came up with  
3 defense, it was on 12 July. On 12 July, after the government  
4 provided the defense an update email and said, "SIPRNET document--we  
5 consulted our security experts. We'll resend a document that was  
6 improperly marked, as you highlighted to the government." We sent--  
7 and Major Hurley, on 12 July, said, "I'm in my new job, I have a  
8 functioning SIPR email address, here it is, please include it when  
9 appropriate for future filings." That's as early as 12 August.

10 On the same day, Your Honor, the government reminds the  
11 defense that, under the current protective order, they cannot access  
12 SIPRNET because it's not on one of the three stand alone computers  
13 and SIPRNET, in the Court's protective order, is only for filing by  
14 the defense experts; just notifying the defense, Major Hurley. And  
15 then what ensues, Your Honor, for about 4 more days, is a back and  
16 forth of "show me where in the protective order." We actually--and  
17 all the emails we can mark for the Court--we actually send the pin  
18 cites to the actual provisions of the protective order back in July.  
19 And then fast-forward to August, it restarts, saying, "We didn't know  
20 this order in place. Send me, again, what order is this?" Your  
21 Honor, this is the Court's protective order for classified  
22 information. And so, yes, we did not provide him--or did not reply  
23 to the second part of what was alleged. The government, Captain

1 Morrow and Major Fein--I did not reply to his SIPRNET email address  
2 because we weren't going to continue doing that or weren't going to  
3 do it in the first place. We've already explained, "If you want,"  
4 and we even said that in the email, "if you want the court order  
5 amended, file a motion." And then Mr. Coombs came on and said, "I  
6 will file a motion," and then they did.

7 MJ: All right. So--I mean, at this point, the parties and the  
8 protective order requires that the filings, including your 505(h)  
9 notice, go to your security expert. And there's no--is there an  
10 issue with that going by SIPRNET?

11 TC[MAJ FEIN]: No, Your Honor, that's already in the protective  
12 order and already approved by the Department of the Army pursuant to  
13 the discussion of the protective order.

14 MJ: Okay. So, right now, you're still--you're going to go over  
15 and visit Major Hurley's office to see if his SIPRNET computer--he  
16 can use that or you're going to provide the stand alone computer with  
17 SIPRNET access? Is that what I'm hearing?

18 TC[MAJ FEIN]: Yes, ma'am; a networked one, not stand alone,  
19 but, yes, Your Honor.

20 MJ: Well, it would have to be networked, that's----

21 TC[MAJ FEIN]: Correct, Your Honor.

22 MJ: Okay. Where he could use that and use his SIPRNET account  
23 and go back and forth with the security expert?

1 TC[MAJ FEIN]: Yes, Your Honor.

2 MJ: Okay. Major Hurley, does that answer the majority of what  
3 you need to do?

4 ADC[MAJ HURLEY]: Yes, ma'am.

5 MJ: Okay. Now, you said you don't know how to--is Chief Ford  
6 here?

7 TC[MAJ FEIN]: Yes, Your Honor.

8 MJ: Okay. Do you have an example of--if Major Hurley gets  
9 together with Chief Ford--that----

10 TC[MAJ FEIN]: Absolutely, Your Honor----

11 MJ: ----they can go through?

12 TC[MAJ FEIN]: ----we'll do that.

13 MJ: Okay. During a recess, why don't we go ahead and make that  
14 work? Okay. And any other issues we need to address with respect to  
15 this motion?

16 ADC[MAJ HURLEY]: Ma'am, if I may?

17 TC[MAJ FEIN]: No, Your Honor.

18 MJ: Yes.

19 ADC[MAJ HURLEY]: I just want to review to make sure that----

20 MJ: Certainly.

21 ADC[MAJ HURLEY]: ----everything is certain. No, ma'am.

22 MJ: All right. So, basically, then, the Secret piece of it in  
23 (a) is already resolved, the Court is denying unfettered access for

1 the defense to SIPRNET classified information, and the government  
2 will go to visit the defense's office as well as the Office of  
3 Military Commissions to determine what's there and to seek  
4 appropriate approvals for the defense's use their--either their  
5 computer or finding a separate computer to give to the defense so  
6 they have SIPRNET access with their security--or Major Hurley has  
7 SIPRNET access with his security officer, is that what I'm hearing?

8 TC[MAJ FEIN]: Yes, Your Honor.

9 MJ: Okay. And please keep me--I'm not going to put a timeline  
10 on this, but please keep me aware of what's going on. Major Hurley,  
11 if you're sitting at--not seeing progress, let me know.

12 ADC[MAJ HURLEY]: Yes, ma'am.

13 MJ: Okay. All right. Also on the agenda, today, we have the  
14 Defense Motion to Compel Number 3 and the government's motion for a  
15 court order with respect to talking to psychiatrists who treated PFC  
16 Manning in Kuwait before he was transferred to Quantico and a defense  
17 request for closure of the Court to litigate certain Military Rule of  
18 Evidence 404(b) motions. Do the parties want to address any of those  
19 issues at this time, or do you want to take a lunch break and address  
20 them in the afternoon?

21 CDC[MR.COOMBS]: The latter, Your Honor.

22 TC[MAJ FEIN]: We're fine with that, Your Honor.

23 MJ: All right. How long would you like?

1           CDC[MR.COOMBS]: We could come back on the record at 1330, Your  
2 Honor.

3           MJ: Does that work for both sides?

4           TC[MAJ FEIN]: We're good, Your Honor.

5           MJ: Anything else we need to address before we recess the  
6 Court?

7           TC[MAJ FEIN]: No, Your Honor.

8           CDC[MR.COOMBS]: No, Your Honor.

9           MJ: Court is in recess.

10          [The Article 39(a) session recessed at 1148, 28 August 2012.]

11          [The Article 39(a) session was called to order at 1340, 28 August  
12 2012.]

13          MJ: This Article 39(a) session is called to order. Let the  
14 record reflect all parties present on the Court last recessed are  
15 again present in court. Is there anything we need to address before  
16 we proceed?

17          CDC[MR.COOMBS]: No, Your Honor.

18          TC[MAJ FEIN]: No, Your Honor.

19          MJ: All right, let's move on, then, to the Defense Motion to  
20 Compel Discovery (3), Mr. Coombs.

21          CDC[MR.COOMBS]: Yes, Your Honor, that is appellate Exhibit 243  
22 or the defense's motion and the government's response is that  
23 Appellate Exhibit 244. The defense has some attachments and

1 enclosures to 243 that we'll be referencing within the argument and  
2 request the Court to follow along as I address the enclosure.

3 MJ: All right. Go ahead.

4 CDC[MR.COOMBS]: Your Honor, if the defense's position that the  
5 government is, again, trying to play board games and find its way out  
6 of a discovery violation. On 26 July 2012, the day before our  
7 Article 13 motion was due, the defense became aware of 84 emails.  
8 And the way the government notified us of this was based sent us an  
9 email and they said, "We got approximately 60 emails to send you that  
10 we think will be obviously material to the preparation of the defense  
11 with regards to the Article 13 motion." And that came at roughly  
12 around 7:50 in the evening. An hour and a half later, the government  
13 sent 84 emails to the defense and the defense immediately, of course,  
14 printed these emails and started reviewing them.

15 And as we went through the emails, it was more than clear  
16 that these were material to the preparation of the defense. These  
17 emails should've been turned over a long time ago. And, based upon  
18 receiving these 84 emails, we immediately notified the Court and we  
19 had an 802 session. If the Court recalls, during that 802 session,  
20 the Court asked the government counsel, represented by Captain  
21 Overgaard, "Government, when did you become aware of these emails?  
22 When did you have the emails?" And her response was, "Major Fein  
23 said that we got these emails approximately 6 months ago, but just

1 look at them on 25 July 2012 in preparation for this Article 13  
2 motion." So, the first thing that we have to believe is that the  
3 government had these emails for at least 6 months, but, as we state  
4 in our motion, we believe it's longer than that, but, at a minimum,  
5 six months and chose to let the emails collect dust somewhere and not  
6 read them until 25 July, the day before--actually, two days before  
7 our Article 13 motion was due. Now, at the time, we didn't know how  
8 many emails we were talking about, but, based upon the government's  
9 representation to us that they were turning over things that were  
10 obviously material to the preparation of the defense, the defense was  
11 suspicious that, again, the government was trying to do--define its  
12 way, carefully, out of providing discovery. So, we asked and we sent  
13 an email and I'd ask that the Court take a look at enclosure to  
14 Appellate 243--it should be emails from the----

15 MJ: Let me just stop you for just a moment. Are we talking--is  
16 this a separate exhibit?

17 CDC[MR.COOMBS]: No, ma'am, it's just an enclosure to it.

18 MJ: Okay. Is this what you're asking me to look at [holding up  
19 email attachments]?

20 CDC[MR.COOMBS]: Yes, ma'am.

21 MJ: Okay.

22 CDC[MR.COOMBS]: It should be--that copy you have--hopefully, if  
23 it's the one I gave, it's highlighted. If that's not----

1 MJ: That's it.

2 CDC[MR.COOMBS]: Okay, ma'am. So, if you see on--if you go down

3 to Friday, July 27th, I sent an email to Captain Overgaard and I

4 said, "With regards to the Quantico emails, Major Fein used the

5 phrase 'obviously material to the defense.' I want to make sure that

6 the government did not have any emails in its possession that were

7 material to the preparation of the defense, as opposed to 'obviously

8 material to the preparation of the defense," again, seeing if there

9 was some difference the government was interpreting in the rule.

10 Captain Overgaard responded that Major Fein used the phrase

11 "obviously material to the defense" because that is what the Court

12 required--or what was required in the 22 June 2012 court order. That

13 being said, the prosecution disclosed the materials that were

14 material to the preparation of the defense.

15 If you turn to the third page--actually, if you go to the

16 fourth page, then I send a follow-up email to Captain Overgaard and I

17 asked if the government had any access to other emails from the

18 individuals listed in the 84 emails that the defense believed

19 indicated a conspiracy by the command at Quantico to keep PFC Manning

20 in Max and POI indefinitely. So, we asked for emails from Lieutenant

21 General George Flynn, Colonel Daniel Choike, Colonel Robert Oltman,

22 Colonel Carl Coffman, and Lieutenant Colonel Christopher Greer. And,

23 again, in response--if you look back on page three--this time,

1 Captain Morrow responded to the defense on 31 July, the same day that  
2 we asked the question. And, with regard to the emails, Captain  
3 Morrow stated, "We disclosed all the emails from Quantico in our  
4 possession that are material to the preparation of the defense."

5 So now we have two separate trial counsel indicating to the  
6 defense that "We've given you everything that's material to the  
7 preparation of the defense. We are not subscribing any special  
8 meaning to 'obviously material to the preparation of the defense' as  
9 opposed to just simply 'material to the preparation of the defense.'"  
10 And like with other discovery issues, if the defense just simply  
11 accepted that representation, that would have been the end of the  
12 story. We would have had the 84 emails and we would be no wiser to  
13 the wise of any additional emails being out there. But, again, being  
14 suspicious, on 1 August, we filed a discovery request. And, in a  
15 discovery request, we listed 17 individuals that we asked the  
16 government to indicate whether or not they had any emails, either  
17 going to or, from these 17 individuals.

18 We also asked the government to provide us with the  
19 preservation request that they stated that they gave to Quantico and  
20 who they gave a preservation request to in order to preserve the  
21 emails and other documentation. And, notably, this preservation  
22 request--the government can be free to correct me if this is wrong,  
23 but the defense, on a December 2010, filed a discovery request for

1 all--any and all documents or observation notes by employees of the  
2 Quantico confinement facility. And shortly thereafter, the  
3 government submitted this preservation request requesting Quantico to  
4 preserve all documentation and their emails in regards to PFC  
5 Manning.

6 Now, on 14 August, 2 weeks after we submitted our discovery  
7 request, the government submitted a response and in that response  
8 they indicated that they started to receive discovery from Quantico  
9 as early as August of 2011. And then they provided a memorandum from  
10 Lieutenant Colonel Christopher Greer that indicated that, as of 20  
11 December 2011, all documentation from Quantico was given to the trial  
12 counsel. So, at that point, when we read the discovery response, the  
13 one thing that jumped out at us is that the government said, with  
14 regards to the 84 emails--this is on page two of their discovery  
15 response which is dated 14 August 2012 and should be an enclosure to  
16 the defense's motion--but they stated----

17 MJ: Which enclosure? Let me look, here.

18 CDC[MR.COOMBS]: Yes, ma'am.

19 MJ: Okay.

20 CDC[MR.COOMBS]: On page two, at the top, they stated that they  
21 identified 84 emails that were obviously material to the preparation  
22 of the defense because they fell into one of four categories:  
23 statements by brig officials describing their classification

1 decisions, including the factors weighed; statements discussing chain  
2 of command directives/orders regarding the accused's confinement;  
3 statements describing the conditions of the accused's confinement,  
4 including descriptions of the accused; or, four, pursuant to the  
5 Court's order--excuse me, pursuant to the Court's prior ruling,  
6 statements involving investigation, damage assessment or mitigation  
7 measures.

8 Now, again, if we just let it go at that, we would be no  
9 word to the wise, but reading that, it indicated to the defense, at  
10 least, that there must be some additional emails because that's how  
11 they identified the 84, so we asked Major Fein, "How many other  
12 emails are we talking about? How many emails does the government  
13 have that they, apparently, just reviewed on 25 July 2012?" And  
14 Major Fein responded that they had 1,374 emails. So, when you  
15 subtract 84, that meant that 1,290 other emails were apparently not  
16 obviously material to the preparation of the defense.

17 Once we were made aware of that on 17 August, the defense  
18 filed its motion to compel the 1290 emails. On that same day--excuse  
19 me, on 23 August, the Court directed the government to provide the  
20 1290 emails for this hearing and on that same day, the government  
21 filed its response to the motion to compel. And there are three very  
22 problematic factors that come out of the government's response.

1               First, they now indicate that they have additional emails  
2       that they're going to provide that are material to the preparation of  
3       the defense. Now, this is coming after two separate trial counsel  
4       said to the government--to the defense that, "We gave you everything  
5       that's material to the preparation of the defense." Now, because of  
6       the motion to compel discovery, because of the Court's requirement  
7       for the government to produce these emails, the government is now  
8       saying, "Oh, wait, there are additional emails that are material to  
9       the preparation of the defense." And just as--and sadly so, just as  
10      the defense had predicted in its motion, the government took a  
11      position that the 8 December 2010 discovery request did not place it  
12      on notice that it needed to produce the emails because they said that  
13      our request did not trigger 701(a)(2) and we didn't trigger that,  
14      apparently, until our request on 1 August 2012, the discovery  
15      request.

16               MJ: What was the earlier request the defense believes triggered  
17      701(a)(2)?

18               CDC[MR.COOMBS]: Yes, ma'am, the earlier request was "any and  
19      all documents or observation notes by employees at the Quantico  
20      confinement facility relating to PFC Manning." And, here, this is  
21      kind of the go-to position for the government and I can hear Major  
22      Fein saying this, "Ma'am, it's not enough specificity. We don't know  
23      what they're asking for. They didn't give us enough specificity."

1                   And on more than one occasion, the Court has said to the  
2 government, "Well, how is the defense supposed to know what they  
3 don't know? They've asked you for the things that they were aware of  
4 or that they believed might be in existence," but in whose wildest  
5 imagination would we believe that a three-star general would be  
6 sending emails regarding PFC Manning and receiving weekly updates  
7 from his Staff Judge Advocate, from the Quantico base commander, from  
8 the Staff Judge Advocate for the Quantico base commander, on minor  
9 stuff, to include when I call my client? How would I ever, or any  
10 reasonable defense counsel, believe that the commanding general would  
11 be that involved in this case?

12                  And the government, in its response, says, "There's no  
13 evidence to suggest that the commanding general is involved, at all,  
14 in the confinement status or how PFC Manning was being held." And,  
15 again, we cited the one email which makes it painfully obvious and  
16 clear that that's not the case. For Colonel Choike, the commander of  
17 Quantico base, said, "Look, the days of us making any decision  
18 without the CG's concurrence are over. If you're going to change his  
19 custody status or classification, you've got to clear it with the  
20 CG." But then, again, alarmingly, the government, now with their go-  
21 to position, says, it wasn't until our 17 August motion to compel  
22 that we provided the materiality for them to know what they needed to  
23 provide.

1 MJ: Mr. Coombs, let me ask you a question. In looking at the  
2 government response, here--and they reference, in 8 December 2010  
3 discovery request that basically wants everything that's ever existed  
4 regarding PFC Manning that went anywhere in the government.

5 CDC[MR.COOMBS]: No----

6 MJ: When I look at that, "any report, email, document,  
7 discussing the need for the State Department to disconnect access to  
8 its files from the government classification network----

9 CDC[MR.COOMBS]: Let me stop----

10 MJ: ----any email, report, assessment, directive, or discussion  
11 by President Obama," I mean, I'm just looking at this hugely broad  
12 discovery request. I mean, what is the specificity?

13 CDC[MR.COOMBS]: Yeah, I would say that it wasn't broad because  
14 those are examples of things that we became aware of, based upon--for  
15 example, for the Department of State, Ambassador Kennedy testifying  
16 to Congress saying, "We, based upon this disclosure, pulled the  
17 SIPDIS database from SIPRNET and we put it on JWICS." And he  
18 testified that that's what the Department of State did in response to  
19 these leaks. So, that provided the basis for me, under 701(a)(2),  
20 now, to say, "Government, can you produce any emails or documentation  
21 regarding that?" My thought process behind that was that would be  
22 aggravation evidence, potentially, that the government would present

1 as an impact on this--I guess charge, if my client is found guilty of  
2 anything.

3                 With regards to the President Advisory Board, again,  
4 that's--that statement from the government indicating President Obama  
5 required and requested a complete review of this and requested his  
6 intelligence advisory board to give an assessment of the leaks. And,  
7 again, that's why we had enough specificity, based upon information  
8 that we're aware of, to make the request under 701(a)(2) to the  
9 government.

10                 Here--I mean, I'm assuming--and the reason why I'm assuming  
11 that is because I filed the 138 request, I did my research on the  
12 Navy correction requirements and rules--SECNAV instruction that  
13 governs this places the sole responsibility and authority within the  
14 Quantico Brig commander. And so, based upon what I would know, then,  
15 the way the rules are supposed to work, the Quantico Brig commander  
16 is the person who has the final say on how someone is being held.  
17 And so that is why I asked for any and all documentation from  
18 Quantico confinement facility.

19                 But the really problematic aspect, here, is we received  
20 thousands and thousands of pages of stuff from the government in  
21 October of 2011 from Quantico; observation notes--you know, stuff  
22 that--if you see reams of paper that are part of the Article 13  
23 motion. The government, now, apparently, wants everyone to believe--

1 and this Court and the defense to believe that, for whatever reason,  
2 they didn't review 1,374 emails. They just--those emails got given  
3 to them like everything else from Quantico and they sat on some shelf  
4 until 25 July and I can only give two explanations for that: either  
5 this is a prime example of lack of due diligence on the government's  
6 part which would be part of our speedy trial motion, or it's a prime  
7 example of the government believing, "Hey, you know what? The  
8 request that he asked there, he didn't--he said 'documents.'  
9 701(a)(2) doesn't define documents as something separate from email,  
10 but we don't open it up until he asks for emails; we just won't open  
11 it up." I mean, that's the only explanation I can think of other  
12 than the government's lack of diligence to look at these. If they  
13 open them up, at any time in the 6--or 7 months to a year that they  
14 have these documents prior to 25 July, then, if they understood  
15 discovery, they would know that stuff that's obviously material to  
16 the preparation of the defense, such as the 84 emails, and, now, as  
17 of this morning, received from the government two discs that,  
18 apparently, contain roughly 600 emails.

19 So, now, the government is providing an additional 600  
20 emails that they believe are either material to the preparation of  
21 the defense or meets with some requirement under Jencks, or Giglio or  
22 is some sort of Brady information, why is this now being placed in my  
23 hands after the Article 13 motion has been filed, after the

1 supplemental to the Article 13 motion has been filed? I have no clue  
2 what's on this, but I'm guessing that if 84 emails required a  
3 supplemental motion, 600 probably will as well.

4 And the defense would say that we be given at least a week  
5 to review them, but, if, in fact, there's a requirement for a  
6 supplemental motion, this would, once again, require the Article 13  
7 motion be pushed, much like it was before, because of the very late  
8 notice by the government of these 84 emails. And now, because of the  
9 government's representations, before, of, "Hey, these are the only  
10 things material to the preparation of the defense," now there's 600  
11 more emails, we still have an additional 700 out there. And, if you  
12 look at the government's response on page four, ma'am, it lists the  
13 eight criteria that they believe the other 700 or so emails that are  
14 still outstanding fall into and, therefore, are not discoverable.

15 The defense would submit that, number one, two, six, seven, and eight  
16 are all factors that would be, in fact, material to the preparation  
17 of the defense.

18 MJ: Well, let's look at those. Number one, public affairs, to  
19 include discussions of media articles and preparing responses to  
20 media queries. How is that relevant to Article 13?

21 CDC[MR.COOMBS]: Yes, our Article 13 motion says--and this is  
22 why there is no legitimate non-punitive government objective for how  
23 they held my client. They were more concerned--and it's clear from

1 the emails--they were more concerned with the media relations, the  
2 public response. The CG's top five categories for "when you have to  
3 tell me something" all deal with how it's going to make us--the brig,  
4 look. And we'll talk about this on Thursday, but Lieutenant Colonel  
5 Greer, the Staff Judge Advocate, also reiterated that which is just  
6 a--disheartening to see that the main thing that they were concerned  
7 about was being portrayed in a negative light. And so-----

8 MJ: Even if that's true, how is that relevant to an Article 13  
9 motion?

10 CDC[MR.COOMBS]: Well, it's true because then you take the  
11 concern of the negative light--we don't want anything to happen to  
12 PFC Manning because that's going to make us look bad. Greer says,  
13 "Look, until and unless somebody from the Army comes down here and  
14 says, 'We're going to be the one responsible,' then we're going to do  
15 what we want with Manning." And the philosophy under Choike was,  
16 "We're going to make sure," and Oltman was, "We're going to make sure  
17 nothing happens to him and our way of doing that is he is going to  
18 stay in Max and POI indefinitely because we're not going to have an  
19 issue where something happens to him and then we get blamed." And,  
20 again, Greer also reiterates that again when he says, "Look, if  
21 something happens to Manning, there's nobody in a green uniform--in  
22 an Army uniform who is going to be held accountable. Basically, the  
23 shoe is going to drop on our desk and people are going to be looking

1 at the Marines." And so the way it's relevant is they used their  
2 desire not to have negative publicity to hold my client in a hole for  
3 9 months with that--with Max and POI and no hope of ever getting out  
4 of it, despite his behavior, despite everything.

5               And we'll talk about this with regards to the next motion,  
6 but it's just--the juxtaposition cannot be more stark between his  
7 time in Quantico and a week later, after arriving to the JRCCF and  
8 he's been there for a year--over a year in medium custody, not  
9 committing any self-harm, trying to commit suicide. Harming others,  
10 he had one incident of a dispute with another detainee that was dealt  
11 with. Never trying to escape, never trying to leak national security  
12 information or anything.

13               So, when you look at the over-arching theme of our motion,  
14 it is the government, in this case the Quantico Brig--with,  
15 unfortunately, the blessing of the government, here, because they  
16 didn't step in even though they were aware this--kept Manning in Max  
17 and POI because they didn't want to have anything happen to him,  
18 period. Not because he needed to be, but because they didn't want to  
19 risk the negative publicity. And so, the public affairs, to include  
20 the discussions of media articles and preparing responses to media  
21 inquiries is relevant and, when you look at some of the 84 emails,  
22 one of the emails are like, "Look, David House is coming to see him  
23 and we turn him away. We need to get ahead of the media spin on this

1 so it doesn't make us look bad. We need to get PO involved--PAO  
2 involved to indicate why." When they're having my client stand at  
3 attention, naked, in the morning, they're like, "We need to make our  
4 spin on this in order to put our version out there. Coombs is  
5 putting out a version that's not accurate." Again, they--the reason  
6 why that would be relevant is because that was their main concern and  
7 that dovetails with number two, protestors at the Marine Corps Base  
8 Quantico and the plans to protest. Our position in our motion is the  
9 incidents that happened on 18 January of 2011--my client being placed  
10 in suicide risk by Chief Averhart was a direct response to the  
11 guards, at that point, taking out a protest outside of the gate on my  
12 client. Because there was a protest that happened outside of the  
13 gate caused a disruption of people coming in and it--inexplicably, on  
14 that day, they chose to harass my client to the point that he had an  
15 anxiety attack. And the mental health professional, Captain--excuse  
16 me, at that point it would be Colonel Malone--will testify that the  
17 activity that happened on that time was an anxiety attack in response  
18 to the gruffness of the guards on that day.

19 So, again, any sort of emails where they're talking about  
20 any planned protests would be relevant. And if you look at number  
21 three----

1 MJ: How are emails between anyone in the government talking  
2 about the protest would be relevant? How would that have anything to  
3 do with the guards?

4 CDC[MR.COOMBS]: Well, when you take a look at it, again, I  
5 mean, we're requesting that--I guess they have their 700 emails--if  
6 the government doesn't produce those, that the Court at least look at  
7 them, but I can only speculate. So, let's say one of the emails is  
8 from one of the, you know--Gunny Sergeant Papakie or Gunny Sergeant  
9 Blenis, one of the guards--main guards at Quantico talking about the  
10 protest, briefing Colonel Choike or briefing the SJA to brief General  
11 Flynn about it and getting direction back about, "Hey, you know, we  
12 need to make sure that we put out our spin."

13 If any of that stuff made Quantico Brig look bad, then  
14 things roll down hill and the bottom of the hill is right here  
15 [pointing at the accused]. And so, if something made their life  
16 difficult, chances are pretty good they made life difficult for my  
17 client.

18 And the prime example of that is on 18 January 2011. And  
19 so, other emails, depending on the timing--so, like, if these emails--  
20 --the government says, "Oh, there's no--you can't tie the protest with  
21 what happened on 18 January. It's just a coincidence that that's the  
22 day of all the days that the behavior is totally different by the  
23 guards." Well, if there's emails going back and forth about this

1 protest, obviously that would be pretty good information. Or, if,  
2 again, depending upon the context of the email--who is saying it--  
3 General Flynn's email, right at the very beginning when my client  
4 arrives, saying, "Look, I think this guy is a risk to commit suicide.  
5 You make everybody who has any contact with him know that they need  
6 to keep a very close watch on him." Obviously, the context of that  
7 email--if a three-star general is telling you that, he's your senior  
8 rater, it's, "Got it," and you, as, then, the Quantico base commander  
9 are putting that issue down to the battalion commander, who is  
10 Colonel Oltman, who then relays that right directly to Chief Averhart  
11 or Chief Barnes, depending upon the timing, and that gets put down to  
12 the guards. And the emails show that even the lowest guard knows  
13 that General Flynn is involved in this whole process.

14 MJ: When you say the emails, are you talking about the 84  
15 emails?

16 CDC[MR.COOMBS]: Yes, ma'am. And in our supplemental motion to  
17 the Article 13, we do our best to pull that out for the Court to show  
18 the contrast. And the government's response to the Article 13  
19 ignores this totally. They ignore General Flynn's email; they  
20 ascribe no importance to that.

21 Well, again, the military--one of the great things about  
22 the military is the chain of command because we get things done, but  
23 it's also one of the bad things about the military because when

1 somebody high up voices an opinion, everyone below them follows  
2 through. So, when General Flynn said "jump" they say "how high?"  
3 And, in this instance, he's saying my client is a suicide risk,  
4 "That's the way I believe he is. You keep a close watch on him."

5 And then, later, it's clear from Colonel Choike--when  
6 Colonel Choike tells Colonel Oltman, "Hey, I just spoke directly to  
7 Chief Barnes," the brig commander, where the buck should really stop  
8 when it comes to a detainee, "I spoke directly to her and I gave her  
9 the CG's intent and the five criteria that the CG had; all those  
10 dealing with publicity or how it's going to impact the brig if  
11 something happens. And I informed her that any change in the  
12 classification or assignment has to be routed up through the CG for  
13 his concurrence." And then Colonel Oltman says, well, you know,  
14 "Hey, I got it. I don't like this and if somebody says 'no,' I want  
15 it in writing." And of course, what you get back from Colonel  
16 Choike, the base commander, is, "Look, if General Flynn doesn't  
17 concur, you're not going to get anything in writing." And the only  
18 reason that would be so is because they know that this is not the  
19 process and I find it hard to believe that a three-star general is  
20 ever briefed on a detainee in any other case but this one.

21 MJ: Well, Mr. Coombs, would it not be unusual for a three-star  
22 general to be briefed if you're having disturbances in international  
23 media regarding someone in your custody?

1           CDC[MR.COOMBS]: Sure, but when you take a look at the emails  
2 and the timing of them, this is long before any of that happens; this  
3 is long before any of those issues arise. And what he's being  
4 briefed on isn't something where you would expect a three-star  
5 general to be briefed on, like, "Look, we're having Dennis Kucinich  
6 or we're having some other distinguished visitor who wants to come  
7 here," you'd understand that. He's being briefed on when I call.  
8 He's being briefed on people who are being turned away at the front  
9 gate. He's being briefed on when I try to pass a message to my  
10 client, which I thought was perfectly acceptable, to the counselor--  
11 my client's counselor, General--excuse me, Gunny Sergeant Blenis,  
12 who, at the time, indicated to me it was perfectly fine. But,  
13 apparently, Blenis, then reports that all the way up to General Flynn  
14 that I did something, apparently, that was improper; no one told me  
15 that, but General Flynn shouldn't know that. And I didn't know  
16 General Flynn knew that until I read these 84 emails.

17           So, this is not the type of involvement that you would say,  
18 "Understood; that's the chain of command being involved on an issue  
19 that they need to be aware of for, you know, their situational  
20 awareness." This is more of General Flynn making the final decision  
21 on anything and everything impacting Manning's change of custody,  
22 classification, or assignment.

1                   And then, when we start to push back--and, again, this kind  
2 of gets into, a little bit, the Article 13, but this is why these  
3 motions--or this motion, in particular, is very important and these  
4 emails are important--because when we start pushing back--you know,  
5 the very sad thing is at the very, very beginning of this process  
6 when I knew my client was in a position that he shouldn't be in,  
7 based upon the mental health professional saying there's no reason  
8 for him to be in POI, I came to the trial counsel and I said, "Trial  
9 Counsel, you know, can you help me out with this? Can you get MDW  
10 involved in order to rectify this issue?" And you see in our Article  
11 13 motion that emails that are going to the trial counsel asking for  
12 his involvement and he comes back saying, "Yes, we're--this is our  
13 number one priority; we're looking at this. The C&A board is about  
14 to meet. We'll keep you advised." And this is telephone calls and  
15 emails going back and forth with the good-faith belief that things  
16 are happening over here that is going to make a difference with my  
17 client. But this email indicates that that's not the case. We get  
18 an email from Lieutenant Colonel Greer, the Staff Judge Advocate,  
19 stating when--he copies Colonel Choike and it's an email that he  
20 sends to the trial counsel and he says, "I told them, you know, if  
21 they're going to add"--because we submitted a 305(g) request for  
22 Colonel Coffman to look at the need to keep my client in confinement  
23 and look at the POI and he--they send--he sends an email to the trial

1       counsel saying, "Look, you know, if you start to question how we're  
2       doing this, it only undercuts your Article 13 motion. So, if you  
3       start raising issues on this, you're just cutting yourself off at the  
4       legs." That's the email.

5           MJ: And that's one of the 84 that you have?

6           CDC[MR.COOMBS]: Yes, ma'am.

7           MJ: Which, at this point--I thought I got an email somewhere  
8       saying I was going to get something with respect to that?

9           CDC[MR.COOMBS]: You did, ma'am, it's--I tried to send it to you  
10      because of the size, but this is part of our Article 13 motion.

11          MJ: These----

12          CDC[MR.COOMBS]: The--excuse me, part of our motion to compel;  
13      it should be.

14          MJ: Yes?

15          TC[MAJ FEIN]: Also, Your Honor, the government has all three  
16      sets of emails ready for the Court as per your email, also. So, the  
17      84 emails, the set that's already been produced to the defense  
18      yesterday and the remaining portions if the Court decided that the  
19      Court wants to review those.

20          MJ: Okay. Before we go any further, is--are those 84 emails  
21      in the record? I don't have them, here, as part of the appellate  
22      exhibit.

1           CDC[MR.COOMBS]: They should be in the record, ma'am. If  
2 they're not, I can provide the Court with this copy because this is a  
3 complete copy of the emails.

4           Now, the 84 emails are Bates numbered--they're not in any  
5 particular order by date--but if you compare that with our  
6 supplemental Article 13 motion where we cite to--oh, actually, yes,  
7 it is--I'm sorry, it is part of the supplemental Article 13 motion.  
8 So, if you look at the supplemental Article 13 motion--and you'll see  
9 where we reference Attachment A and Attachment A is the 84 emails and  
10 then we provide a Bates number for the ease of----

11          MJ: Let me just ask you a question. The email that came to me  
12 on the 24th of August had the supplemental motion. Did it have the  
13 attachments with it as well?

14          CDC[MR.COOMBS]: It--the very--like the very next email, I  
15 forwarded the attachments from the government with how you could open  
16 it, but, apparently, it got stripped because of DISA or whatever  
17 couldn't receive that type of an email. The government could send  
18 it, but no government account could receive that. So, in that email,  
19 though, I also indicated to the Court that I would bring a hard copy  
20 and so that's what's part of the record, there, ma'am.

21          MJ: Okay.

22          CDC[MR.COOMBS]: So, again, when you look at that, it can be  
23 confusing if--because it's nowhere--it's not in order, at all, by

1 date or by person or anything, but, if you look at the supplemental  
2 motion, whenever I state a fact, it will say, "See Attachment A and  
3 then the Bates number." And the Bates number that--that attachment  
4 is ordered by Bates number so you could quickly find it.

5 MJ: Okay. And that is this attachment [holding up the email  
6 from the defense counsel]?

7 CDC[MR.COOMBS]: Yes, ma'am.

8 MJ: Which is to the motion to compel?

9 CDC[MR.COOMBS]: That--actually, that attachment is in the  
10 supplemental motion for the Article 13. The motion to compel doesn't  
11 have the attachment.

12 MJ: Okay. Got it.

13 CDC[MR.COOMBS]: That's another copy for the Court.

14 MJ: Okay.

15 CDC[MR.COOMBS]: All right. I'll save your printer, ma'am. But  
16 if you look down, also, with the other factors, each of these factors  
17 could, depending upon the context of the email, be something that is  
18 material to the preparation of the defense, understanding what that  
19 is required to qualify under 701(a)(2); providing it to the defense.  
20 The other 700 emails unfortunately--will look at these 600 and then  
21 see what we have here. But, again, the other 700, the defense would  
22 argue is, probably--unless it truly is, you know, just a logistical  
23 thing and not involving the entire chain of command--is probably

1 relevant and material for this motion as well and should be produced.  
2 So now, I think this motion has gone from compelling 1,290 emails  
3 down to whatever is left, minus what is on this CD and the government  
4 indicated to me they roughly estimate there's 600 or so emails, here.

5 MJ: Okay. Major Fein, you've told me--you're going to have a  
6 copy for the record as well as a copy for me of the three separate  
7 categories of emails?

8 TC[MAJ FEIN]: Ma'am, the government would offer that we provide  
9 a digital copy on a CD for the record and we'll print a copy for the  
10 Court of all three sets of the emails if that's what the Court  
11 ordered for the third set, the set that was not disclosed to the  
12 defense.

13 MJ: Okay. Well, I'll hold off on that.

14 TC[MAJ FEIN]: Yes, ma'am.

15 MJ: Go ahead.

16 CDC[MR.COOMBS]: Okay.

17 MJ: But definitely provided for the record.

18 TC[MAJ FEIN]: Yes, on--can we--may we provide the CD, Your  
19 Honor?

20 MJ: Yes.

21 CDC[MR.COOMBS]: So, again, ma'am, this is something where this  
22 discovery--it just goes, really, back to why are we just now finding  
23 out about the existence of these emails days before filing the

1 Article 13 motion? If these were reviewed when they should have  
2 been, when the government received the discovery back in, at the  
3 latest, November 2011, then the government would have been able to  
4 produce these documents. So, we would ask that the government  
5 reaffirm that 25 July was the first date that they looked at that and  
6 why because that, again, will be relevant to the due diligence  
7 motion. But then we ask that the Court look at the remaining 700 and  
8 determine whether or not any of those emails should be placed in the  
9 hands of the defense.

10 And then, finally, we request a week to review these emails  
11 and alert the Court whether or not there's a need for a supplemental  
12 Article 13 motion; so, in this case, a supplement to the supplement,  
13 based upon the 600 emails.

14 MJ: All right. Thank you. Major Fein? Well, first, before we  
15 even get started, why is the 600--well, go ahead; I'll ask you the  
16 questions as we go.

17 TC[MAJ FEIN]: Well, ma'am, to clarify what has and hasn't been  
18 produced--this might answer your question--the government did  
19 produce, on--via email, then later through normal production process  
20 on 26 July, 84 emails.

21 MJ: Okay. Let me ask you one more question. Did you send me  
22 an email with the government response?

1           TC[MAJ FEIN]: Of the government's actual written response to  
2 the defense?

3           MJ: Yes----

4           TC[MAJ FEIN]: Yes, Your Honor.

5           MJ: ----the Defense Motion to Compel Discover (3)?

6           TC[MAJ FEIN]: It would have been dated----

7           MJ: 23--well, it's 23 August 2012. Did you say earlier you  
8 were having witness--or email issues?

9           TC[MAJ FEIN]: Receiving emails from Mr. Coombs, yes, ma'am, but  
10 not necessarily----

11          MJ: All right. Go ahead.

12          TC[MAJ FEIN]: You just referenced our response, Your Honor,  
13 with--when you talked about the different categories.

14          MJ: Uh-huh, I have it.

15          TC[MAJ FEIN]: Okay. So, Your Honor, first and foremost, we're  
16 talking about 84 emails that were already produced, we'll get to that  
17 in a moment to answer what occurred based on the timeline the defense  
18 has already proffered. Second is we did produce other emails last  
19 night--we'll get to that in a moment--and so we're talking about a  
20 third population of emails that we're arguing are not material to the  
21 preparation of the defense.

22           First and foremost, based off what the defense just  
23 proffered and the written motion, the majority of that information is

1 not based off of fact and is simple argument and conjecture. You  
2 have the 84 emails--if the Court reviews them will see--and, again,  
3 it is almost fanciful to conjecture that a three-star and all these  
4 other individuals on these emails had such an extensive role.

5                 The defense seems to confuse the officials--senior  
6 officials being brought up to speed and being concerned for Private  
7 First Class Manning's well-being with them being involved in the  
8 ultimate custody, classification, and status which is the Article 13  
9 motion according to what the defense has filed. So, the government  
10 argues that most of what the defense said was trying to keep track of  
11 each one, but, unfortunately, the majority of it is not fact-based;  
12 there is not an email to cite back to. You have the 84 emails, now,  
13 and if the Court decides to review them all, the Court will see that  
14 this theory is simply that: argument and theory. It doesn't exist  
15 in the actual facts and with the witnesses that the government  
16 already has on its witness list, the defense already--originally, I  
17 know we'll litigate that at a different time this session--the  
18 remaining witnesses, but every single witness will also, as we  
19 proffer, testify about how the chain of command was not being  
20 directive in nature and that's what the emails will show.

21                 Your Honor, for timing--to explain the timeline, most of  
22 what the defense has proffered, the government agrees with. 8  
23 December 2010 was the defense's discovery request--and, if the Court

1 could reference that again, Your Honor, it is Enclosure 1 to the  
2 government's response, dated 23 August. And as the government  
3 highlighted in its written response, even in this discovery request,  
4 on 8 December 2010, the defense does recognize that certain  
5 organizations have emails and specifically asks for emails. If you  
6 look at 2(b), talking about the Department of State, it goes all the  
7 way through and then the third to the last line, "any report, email,  
8 or document." It's done four times throughout this discovery request  
9 and then you get to Quantico and it just says "all documents and  
10 observations" and the government complied with that discovery  
11 request.

12 Discovery requests, Your Honor, under 701(a)(2) are what  
13 the defense uses to inform the prosecution on what they specifically  
14 are asking for and for the prosecution to answer the defense. And  
15 the prosecution has the--as we've already litigated in pretrial  
16 motions--if we're in possession of material and we review the  
17 material despite a defense request and we see something that is  
18 obviously material to the preparation of the defense, we disclose  
19 that material. So, when you look at the actual timeline, Your Honor,  
20 starting on 8 December 2010 with this discovery request, it did not  
21 ask for emails, that the defense did contemplate emails were in a  
22 population of--or in a buffet of options to ask for--we responded to  
23 that discovery request. Now, fast forward to 28 April 2011, a few

1 days after Private First Class Manning was moved to Fort Leavenworth,  
2 the government asked--requested for Marine Corps Base Quantico to  
3 preserve all documentation concerning Private First Class Manning's  
4 confinement there, knowing that this would likely be litigated.

5 By 20 December 2011, Quantico finally certified that they  
6 gave us all the material. As the defense has already said and we  
7 agree with, starting in early fall of 2011, we started producing the  
8 documentation based off previous discovery requests and subsequent  
9 requests; never for the emails. The government never reviewed those  
10 emails because it was never a priority as informed by the defense's  
11 discovery requests. The very first time anyone on the prosecution  
12 team reviewed any of those emails was on the 25th of July, as  
13 previously stated.

14 MJ: Why did you wait that long knowing the Article 13 motion  
15 was coming up?

16 TC[MAJ FEIN]: Yes, Your Honor, the reason, ultimately, the  
17 government waited that long is because all the other motions are  
18 coming up as well. We don't really have time--I go back to the  
19 defense's discovery requests are what informs us, not only on what  
20 the defense is looking for, but prioritizes what the government must  
21 do. And with the number of counsel with this case, it does  
22 prioritize. We push through all the other discovery that the defense

1 is requesting and continue moving and continue moving and then the  
2 next suspense--the next requirement, and then we move to it.

3 So, what happened here was, starting on 25 July, in  
4 preparation to receive the defense's motion and start responding to  
5 it, we started reviewing the emails looking for impeachment evidence  
6 and Jencks material, Your Honor, because that is what was remaining  
7 under our obligation. We have these emails, we need to review them  
8 for any type of impeachment, Brady material, which would be under  
9 DiGilio--Brady material under DiGilio and Jencks material because  
10 we're formulating our own witness list. So, the government started  
11 reviewing the emails and immediately, once we realized there's  
12 material on there that is obvious to what the defense has already  
13 alleged in discussions or with the Court during the previous witness  
14 litigation for Article 13, discloses the 84 emails as soon as  
15 possible.

16 Then, after that--that was on 26 July--then we fast forward  
17 to 1 August, the defense, again, submits a generic and broad  
18 discovery request for all emails of Quantico Brig. The government  
19 goes through--the defense continues to submit these types of  
20 requests. The government responds, "We're not giving you all the  
21 emails. You didn't even proffer what is material to the preparation  
22 of the defense."

1                   So, finally, on 17 August, the defense submits a specific  
2 request giving--informing the prosecution on what is material to the  
3 preparation of the defense and the prosecution isn't left guessing.  
4 So, in our response, Your Honor, dated--the United States' response,  
5 dated 23 August, is why the prosecution then answered saying, "The  
6 United States will produce all emails of both witnesses--of all  
7 witnesses of both parties."

8                  MJ: When you say "all witnesses of both parties," there's  
9 several being contested right now. Are they included among them?

10                 TC[MAJ FEIN]: They are not, Your Honor. They are not.  
11                 Although there are emails from some of those individuals, like--the  
12 defense has already referenced Lieutenant Colonel Greer--that is not  
13 what we produced unless that was produced under what is, first,  
14 obviously material to the preparation of the defense and then what is  
15 also listed in our response--we produced all emails of witnesses from  
16 both parties and all those required under, ultimately, *DiGilio* and  
17 *Jencks*. So, that would include emails from individuals that are not  
18 on either witness list, so, based off of what the defense has now  
19 informed the prosecution they're looking for, for the first time,  
20 very specific--or just specifically, not every and all. And then, as  
21 soon as we could, once this was filed, Your Honor, we started getting  
22 those emails together and that's the population we produced--we had  
23 ready last night and gave to the defense this morning.

1 MJ: Well, let me ask both sides question, here. Right now, we  
2 have, currently on the calendar--we're scheduled to litigate this  
3 motion, today, and then we're scheduled to litigate the production of  
4 defense--the motion to compel Article 13 witnesses. Now, assume I  
5 review these emails--which I haven't seen any of them yet, the 84,  
6 the 600, or the 700 still remaining at issue--plus the defense  
7 supplement to the Article 13 motion which I got, I believe, on  
8 Friday--I'm good, but I'm not that good; I can't do that in 2 days.  
9 So, we may need to be adjusting our court calendar, here. I guess  
10 it's just not possible.

11 CDC[MR.COOMBES]: Ma'am, the defense would agree because, I  
12 believe, more than likely, based upon the 600 additional emails that  
13 are provided, there are going to be more witnesses, potentially,  
14 which, undoubtedly, will be denied by the government and we'll be  
15 back at a motion to compel again.

16 TC[MAJ FEIN]: Your Honor, the United States' only response is  
17 that, without a request, we don't know what we would agree or  
18 disagree--but going back to what's already written in the motion, why  
19 we're here, today, these emails aren't going to inform the  
20 government's position--inform the defense any more or less on what  
21 they're already arguing. They're not going to bolster their argument  
22 one way or another. They are administrative and, if we go down all  
23 the categories, again, the facts--the emails, themselves, once the

1 Court looks at them, I think, would inform us that we won't need to  
2 delay--any further delay in this.

3 MJ: Well, we're going to have to have some delay because I  
4 can't possibly look at----

5 TC[MAJ FEIN]: Yes, ma'am.

6 MJ: ----1,500 emails in two days and----

7 TC[MAJ FEIN]: Yes, ma'am.

8 MJ: ----figure this out.

9 CDC[MR.COOMBS]: And then, again, I--is the government speaking  
10 about the 700 remaining or the 600 that they found were material to  
11 the preparation of the defense? Because it would seem that the 600  
12 that are material to the preparation of the defense, obviously, are  
13 going to be important and would impact what we do.

14 TC[MAJ FEIN]: Well, as the defense has said multiple times,  
15 Your Honor, material to the preparation of the defense is a very  
16 broad standard.

17 MJ: Yes.

18 TC[MAJ FEIN]: The government's position is that it doesn't help  
19 the defense one way or another, but we still disclosed them with  
20 simple argument, not any new facts that will assist. But, going down  
21 these categories for the remaining emails, if the Court does order  
22 them to be reviewed--or orders them to be produced for reviewing--

1 public affairs, Your Honor--again, go back to what the defense was  
2 proffering--is simple argument; there's no facts that support that.  
3               A commander being informed of what is going on on his  
4 installation is the way the military works. There is no evidence  
5 that that commander or any other commander directly influenced the  
6 decision-making--did not, you know--invaded this administrative-like  
7 due process that Private First Class Manning card while at Quantico;  
8 there is no evidence to that, nor do the emails. You can interpret,  
9 I guess, as the defense is trying to do, these emails to mean that,  
10 but as you look at them all across the board, each of the categories,  
11 public affairs guidance--not because, as the defense proffers, the  
12 Marine Corps was more concerned about their public affairs, they were  
13 concerned about their public affairs, but they were also concerned  
14 about Private First Class Manning. The reason the information wasn't  
15 released to the public is for his privacy. They're making decisions  
16 on an individual Soldier. They make those decisions; that isn't  
17 necessarily captured in email.

18               These are only the emails that are provided and it's the  
19 emails that they found that go to the confinement. So, it doesn't  
20 necessarily mean that the public affairs--that they're more concerned  
21 about that; it doesn't mean that the protesters--force protection--  
22 there's no evidence to say that the guards inside the confinement  
23 facility--somehow their decision-making or their mood or attitude was

1 somehow affected by what was going outside, I think, about 10 miles  
2 away, at a different area at Quantico. That is their theory, that is  
3 what they're arguing, but there is no evidence. There's no emails,  
4 there's no evidence that talk to that point, Your Honor, and you'll  
5 see that as you go through these emails.

6 So, we provided these categories, hopefully, to guide the  
7 Court and to provide the defense and ability to argue each of these  
8 categories and how the facts would support some type of materiality  
9 of how this will help the defense better prepare.

10 Your Honor, also, defense offer to the Court--there's only  
11 two remedies or reasons that we're here today--and it was either lack  
12 of diligence to look--the government has provided the explanation of  
13 why it started on the 25th--or that we--some reason that the United  
14 States, for some reason, chose not to because of 701(a)(2) and  
15 confusing the issues, go back to--we never received a discovery  
16 request for this. The only reason the defense does know about this  
17 is because the government informed them of it. While we were doing  
18 our reviews, the *Brady*, *Giglio*, and *Jencks* reviews, we then informed  
19 the defense and kept informing the defense.

20 MJ: I'm still wondering why you waited until the 25th of July.

21 TC[MAJ FEIN]: Yes, Your Honor. Your Honor, again, the defense  
22 requests inform us and prioritize the prosecution. When dealing with  
23 so much information, the priority always go to what the defense is

1 specifically requesting so we can answer it, what the Court is  
2 ordering, and what is currently be litigated. At no point was this  
3 ever requested. So, we did go through them, Your Honor, not as a  
4 surprise, not in order to, at the 11th hour, to turn around and say,  
5 "Here it all is." No, it was--we were, then, preparing for our  
6 litigation--prior to the motion being filed, we were preparing our  
7 response to the Article 13 motion and started looking at it under the  
8 legal authorities; for impeachment evidence and for Jencks material.  
9 And as we did that and saw something that stood out, we immediately  
10 disclosed it.

11 Your Honor, absent any further question----

12 MJ: No, I don't have anything else. Thank you. Mr. Coombs?

13 CDC[MR.COOMBS]: Just briefly, Your Honor. The government says  
14 that defense requests inform them and help them prioritize what they  
15 do and, apparently, these emails, whenever they got them, 7 months to  
16 a year ago, again, were not prioritized; they were just sitting  
17 somewhere because they haven't received, in their mind, a specific  
18 enough request. That presents, again, two problems: one, is there  
19 any other pieces of information that are just sitting somewhere the  
20 government hasn't looked at in this case and----

21 MJ: Mr. Coombs, I'm sure there's a lot of information  
22 pertaining to this----

1           CDC[MR.COOMBS]: That they have that hasn't been turned over--  
2 see, this is the problem with the government's logic. They asked for  
3 this stuff, directly--they asked to preserve this and they asked to  
4 retain this and they asked for emails. They asked for them because  
5 they were aware of them. We weren't aware of them. But they asked  
6 for emails in order to retain them and they did that, probably, as  
7 they even indicated, for the potential Article 13 motion. And they  
8 looked at everything else, but they just didn't look at the emails;  
9 they just sat somewhere.

10           So, is there other stuff that they've asked for, received,  
11 they've got it, it's in their possession, it's from a--somebody  
12 that's within the possession of the military custody and control and  
13 they're just--haven't looked at it yet because, apparently, we  
14 haven't prioritized it for them--what their obligations are? That's  
15 the absurd nature of that logic. That's not an excuse, that's a, "my  
16 dog ate my homework" excuse.

17           And then, when you take a look at their other types of  
18 excuses--I mean, they make lack of diligence look like altruism in  
19 this case and it's not. We were aware of these 84 emails, yes,  
20 because they gave them to us, but they had an obligation to give  
21 these things to us. And they had an obligation to give them to us a  
22 long time ago if they were diligent in looking at this stuff.

1           They go back, time and time again, to a version of  
2 discovery in the military that simply does not exist. They believe  
3 that you almost have to play pin the tail on the donkey when it comes  
4 to discovery under 701(a)(2), with enough specificity of exactly what  
5 you're asking for and the materiality of it, in order to get us to  
6 get off of our duffs to look at the stuff. That's not how 701(a)(2)  
7 works. 701(a)(2) requires me to ask for something with enough  
8 specificity that the government knows what I'm asking for.

9           My request on 8 December was "any and all documentation  
10 dealing with PFC Manning and his custody status." It's clear what  
11 I'm asking for and, at the time, if I would have known that General  
12 Flynn was involved in the process, if I would have known that Colonel  
13 Choike was involved or Colonel Oltman, I would have known that the  
14 SJA, Lieutenant Colonel Greer or Colonel Miner were involved in this  
15 process, yes, I would have asked for those emails. The other  
16 instances in which the government believes, somehow, they're--they  
17 have the a-ha piece of evidence why this is not specific enough when  
18 we ask for emails and other instances was we were aware of emails in  
19 those instances. And so, here, you're asking for what you're aware  
20 of and the good-faith obligation of the government, then, is to go  
21 get these things.

22           MJ: Well, Mr. Coombs, where I'm looking at this is--when you  
23 start going up the chain, there's got to be a connection as you work

1 your way up between what these people on high are doing, managing  
2 public affairs or whatever, and what the conditions of confinement  
3 are or the treatment of PFC Manning----

4 CDC[MR.COOMBS]: Right.

5 MJ: ----and the steps along the way have to be made. You can't  
6 go from here to here--and this is all relevant if the people down  
7 here making the decisions don't know anything about it.

8 CDC[MR.COOMBS]: No, I know, and I would 100 percent agree with  
9 the Court. And if the world in which Major Fein lived in exists in  
10 this case, I wouldn't get any of these emails. But all you have to  
11 do is read the supplemental Article 13 motion and read for yourself  
12 the email from Colonel Choike; it's in plain English, not confusing  
13 at all. It clearly indicates that General Flynn is the individual  
14 who will make decisions on the custody status of PFC Manning.

15 MJ: Which email are we talking about?

16 CDC[MR.COOMBS]: I'll have to get--if you can give me back--and  
17 it's the email that I sent to the Court when I was requesting the  
18 continuance. Again, these are not in any particular order and it  
19 might be easier, ma'am, if I could have a copy of the Article--the  
20 supplemental Article 13 motion and I could----

21 TC[MAJ FEIN]: Your Honor, we have the Bates number.

22 CDC[MR.COOMBS]: All right.

23 TC[MAJ FEIN]: Your Honor, the Bates number is 449914.

1           CDC[MR.COOMBS]: All right. So, ma'am, just as background, this  
2 is from Colonel Choike, the base commander, to Colonel Oltman, the  
3 security battalion commander. The email behind it is the email that  
4 Colonel Choike is responding to right now.

5           MJ: So Colonel Choike is the base commander and Colonel Oltman  
6 is who?

7           CDC[MR.COOMBS]: The security battalion commander. And the CG  
8 is General Flynn; that's who they're referring to, there. I

9           MJ: All right. If either side would like to create a wire-  
10 diagram of who is who during this period of time, the Court would  
11 greatly appreciate it.

12          CDC[MR.COOMBS]: Yes, ma'am.

13          MJ: [Reviewing the email.] All right.

14          CDC[MR.COOMBS]: So, reading that email, it's clear that the CG  
15 is the individual that has to be cleared on any change unless they're  
16 upping the custody status to save life and General Flynn has made  
17 that clear, apparently, to Colonel Choike from that email. Colonel  
18 Choike is making that clear to Colonel Oltman and Colonel Oltman is  
19 obviously not happy about it. He wants--if, in fact, the CG non-  
20 concurs, "I'd like to have something in writing," and he's told,  
21 "You're not going to get it." That email, contrary to what Major  
22 Fein has said, today, clearly indicates that the chain of command way

1 up here [holding hand up to his head] was involved in everything  
2 going on down here [holding hand at waist-level].

3               Other emails that are referenced in the supplemental motion  
4 on the Article 13 show the lower people being aware of that. For  
5 example, Gunny Sergeant Blenis saying, you know, "I know that this  
6 issue is going to be briefed by Averhart to Oltman who is going to  
7 brief it to Choike who will brief it to Flynn." So, people know the  
8 fact that General Flynn is involved and being briefed on this and  
9 having the final say on this issue. And just looking at, you know,  
10 our own experience--I mean, your prior experience in any other duty  
11 position, can you think of a time in which a three-star or any  
12 general, for that matter, is involved in what is happening at a  
13 company level? Because that's the equivalent of what's happening  
14 here; a three-star general talking about how some private is being  
15 treated in the company. And when you have that--especially when you  
16 have that in this instance, that's why you have nobody willing--  
17 despite the overwhelming evidence to the contrary--that Manning  
18 doesn't need to be in Max or POI--no one willing to do anything  
19 because that's what the CG wanted and that's--obviously, if he  
20 doesn't non-concur, that's--he's indicating his belief that that's  
21 the right status.

22               So, we'd ask that when you look at that--again, that along  
23 with the other emails, as you go through, will support everything

1 that the defense is saying, contrary to what the government is  
2 representing. And that also would cause pause, I guess, for the  
3 government's judgment, not only on what initially was only 84 emails  
4 that are material, now has come to 600, but also their judgment on  
5 the other 700. Thank you, Your Honor.

6 MJ: Thank you. Major Fein?

7 CDC[MR.COOMBS]: What the trial counsel has handed me--I mean,  
8 I'll do something--in the motion, it actually lays out the rank  
9 structure, but what I have, here is General Flynn at Quantico,  
10 Colonel Choike is the garrison commander, Colonel Oltman is the  
11 security battalion commander, Denise Barnes is the brig CO, and then  
12 Gunny Sergeant Blenis is the counselor. So, this diagram, which I'll  
13 do up for the Court, the defense would agree that this lays out the  
14 relationship----

15 MJ: Been marked as appellate exhibit; a hand-written diagram is  
16 fine as long as I've got something I can read.

17 CDC[MR.COOMBS]: Okay, ma'am. And the only thing, there, is  
18 General Flynn is the senior rater for both Choike and Oltman and  
19 Oltman is the senior rater for Barnes or Averhart, the brig  
20 commander. So, the--it's not only somebody that is superior in rank,  
21 but these are individuals who, you know, have the final say on your  
22 evaluation report.

1 MJ: All right. That would be--the diagram, there, of the chain  
2 of command, at Appellate Exhibit 276.

3 CDC[MR.COOMBS]: Yes, Your Honor. So, subject to your  
4 questions----

5 MJ: There's something on the back of it. I don't know what  
6 that is, but----

7 TC[MAJ FEIN]: Ma'am, we pulled a copy of the appellate exhibit  
8 list on the back of it. We can run a clean copy.

9 MJ: Why don't we go ahead and do that and make a clean copy for  
10 me also?

11 TC[MAJ FEIN]: Yes, ma'am.

12 MJ: Thank you.

13 CDC[MR.COOMBS]: Subject to your questions, ma'am.

14 MJ: I think I've asked them all. We had----

15 TC[MAJ FEIN]: Ma'am, may the government have----

16 MJ: Yes.

17 TC[MAJ FEIN]: -----one moment----

18 MJ: Yes.

19 TC[MAJ FEIN]: ----to rebut a quick issue?

20 MJ: Certainly.

21 TC[MAJ FEIN]: Ma'am, first, just to go back to the discovery  
22 request for emails, there's been a chain of command in place at  
23 Quantico since day 1. The defense could have asked for these emails.

1       The government is not, of course, saying on the record--not trying to  
2       play games--went through these emails under obligations to turn them  
3       over. The defense chose not to submit that request. They outlined  
4       the others and, as we've outlined four other times about the emails.

5               Second, and to answer the question the defense posed the  
6       Court rhetorically, "When do three-stars get involved with a single  
7       Soldier's determination?" It's very simple: it's when a single  
8       Soldier is potentially suicidal or commits suicide. Every  
9       installation has that reporting requirement; it goes all the way up  
10      to DA. And as you've read through all the motions and continue  
11      reading as we litigate Article 13, that's what's going on back here  
12      and that's what you'll see in all the emails-is the chain of command  
13      being concerned, being informed, but not necessarily direct.

14       MJ: All right. Why don't we take a brief recess? How long  
15      with the parties like?

16       CDC[MR.COOMBS]: Could we start again at 1500? That's fine.

17       TC[MAJ FEIN]: 1500 is fine, ma'am.

18       MJ: All right. Court is in recess until 1500.

19       [The Article 39(a) session recessed at 1447, 28 August 2012.]

20       [The Article 39(a) session was called to order at 1508, 28 August  
21       2012.]

22       MJ: This Article 39(a) session is called to order. Let the  
23       record reflect that all parties present in the court last recessed

1 are again present worked. I see a copy of Appellate Exhibit 276  
2 before me. Is that my copy?

3 TC[MAJ FEIN]: Your Honor, that's the copy for the record.  
4 We'll also get your copy, Your Honor.

5 MJ: Thank you. All right, the Court is prepared to rule on the  
6 Defense Motion to Compel Number 3. The government will mark each of  
7 the three sets of emails as separate appellate exhibits; 84 emails  
8 disclosed to the defense on 26 July 2012, the disc of additional  
9 emails disclosed to the defense on--when were they disclosed, Major  
10 Fein?

11 TC[MAJ FEIN]: Your Honor, we made them available yesterday,  
12 they received them today.

13 MJ: Today? Okay, that would be 28 August 2012--and the  
14 remaining emails that are not disclosed--CD-ROMs will--or CDs will  
15 suffice. The government will provide me with printed copies of each  
16 set of emails, preferably double sided.

17 2. The Defense Motion to Compel Discovery is granted, in  
18 part. The government will give the remaining undisclosed emails to  
19 me for *in camera* review to determine if any or all of them are  
20 material to the preparation of the defense under M.R.E. 701(a)(2).

21 3. The defense request for a continuance--I believe you  
22 asked for one week to review the CD-ROM of approximately 600 emails  
23 disclosed, today, to determine whether to file additional supplement

1 to the Article 13 motion or to request additional witnesses is  
2 granted, however, we do need to make adjustments to the court  
3 calendar and counsel and I held a brief R.C.M. 802 conference--once  
4 again, that's where I talk to counsel about logistics and scheduling  
5 issues that arise. We discussed that in chambers because, if I am  
6 looking at the additional emails that haven't been disclosed and any  
7 or all of them are disclosable, it's going to take me some time to do  
8 that. So, that 7 days is probably going to be a little bit longer  
9 than that because I'm going to have to finish my review. If I  
10 determine none of them are disclosable, then we're fine with the 7  
11 days, but if there are additional emails that are disclosable--  
12 basically, you're going to have longer than 7 days to decide whether  
13 you need additional witnesses or to file additional paperwork.

14 The parties and the Court were going to get together to  
15 look at the court calendar again; I believe that's scheduled for  
16 tomorrow afternoon. So, we're going to look at how best to make  
17 these adjustments without delaying the trial.

18 Does either side have anything to supplement the  
19 conference?

20 CDC[MR.COOMBS]: No, Your Honor.

21 TC[MAJ FEIN]: No, Your Honor.

22 MJ: Okay. Let's look, now, at the government's motion for a  
23 court order. Has that been marked as an appellate exhibit? I have

1 Prosecution Motion for a Court Order for Mental Health Care  
2 Professionals.

3 ATC[CPT OVERGAARD]: It's Appellate Exhibit 269, Your Honor.

4 MJ: Okay. And, in response to that, I asked the defense if you  
5 were claiming any privileges and I got an email response back. Has  
6 that been marked as part of the record?

7 CDC[MR.COOMBS]: It has not, Your Honor.

8 MJ: Okay. Why don't we do that? I don't believe there's any  
9 written response from the defense?

10 CDC[MR.COOMBS]: No, Your Honor, there is not.

11 MJ: Okay. All right, that would be the emails, my request on  
12 August 20th--I think the day they occurred. All right. Would the  
13 government like to articulate, then, their motion, for the record?

14 ATC[CPT OVERGAARD]: Yes, ma'am. Ma'am, the government has  
15 asked for the court order requiring all mental health professionals  
16 treating the accused to speak to the government without limitation  
17 and to produce their notes that they took from 30 January '09 to  
18 present for several reasons. And, just as an overview, I'll give  
19 those reasons up front, ma'am.

20 The government has been unsuccessful in even obtaining  
21 contact information for two mental health professionals and that  
22 would be Captain Richardson and Lieutenant Commander Weber who are on  
23 the government's witness list. And the stated policy of the hospital

1 at Camp Pendleton who represented that was the Navy's position, said  
2 it is not their policy to allow mental health professionals to speak  
3 about a case without a waiver or without a court order and the  
4 government requested a waiver from the defense and the defense did  
5 not--refused to provide a waiver and told the government to file for  
6 a court order. So, the government has not even obtained, much less  
7 spoken with these two witnesses on their witness list--the mental  
8 health professionals at Quantico. Also, that they relied on the  
9 AHLTA system notes--which are the computer system that maintains  
10 medical records--including those maintained by the mental health  
11 professionals in Kuwait in making their assessments----

12 MJ: Let me ask you just a brief question, here. When I sent  
13 the email to the defense asking if they were invoking a privilege,  
14 they said, "no," but they also said "relevance."

15 ATC[CPT OVERGAARD]: Yes, ma'am.

16 MJ: Now, the mental health professionals at Quantico, the  
17 doctors there----

18 ATC[CPT OVERGAARD]: Yes, ma'am.

19 MJ: ----did they actually--did they have access to this--these  
20 mental health records on that system that you're talking about?

21 ATC[CPT OVERGAARD]: They did, ma'am, and they also said that  
22 they looked at them. And they also said that had looked at hand-  
23 written notes from Kuwait which the government has, actually, not

1 seen or even learned about until last week. So, there's potentially  
2 notes out there that nobody--neither the government nor the defense  
3 has seen and that the doctors at Quantico actually did rely upon.  
4 And one of the doctors at Quantico said that he also took hand-  
5 written notes which the government has not seen, but he has said that  
6 those are also maintained in a hard file.

7                 The third reason is that the mental health professionals  
8 that the prosecution has spoken with, Colonel Malone and Captain  
9 Hocter, the ones at Quantico, ma'am, seem unsure of the full extent  
10 of the waiver. They're not sure how far they can go in disclosing  
11 information to us. I mean, they understand that there's been some  
12 sort of limited waiver from the defense, but they're not sure of the  
13 extent of it or, you know, if they're obligated under, you know,  
14 their, I guess, physician-client privilege, or something to that  
15 effect, to hold any information back.

16                 And, fourth, ma'am, by putting the accused's mental health  
17 in issue in the Article 13 motion, the defense has triggered an  
18 exception to M.R.E. 513. Although they've said they're not stating a  
19 privilege, they have triggered the--M.R.E. 513(d)(7) and the  
20 government will articulate why that is important.

21                 And the government also contends that the accused has  
22 waived his privilege under 510 with regard to Captain Richardson,  
23 Lieutenant Colonel Weber, the doctors at Kuwait, Captain Hocter,

1   Colonel Malone, Lieutenant Colonel Russell, the doctors at Quantico,  
2   and the----

3           MJ: Now, Lieutenant Colonel Russell, who is he?

4           ATC[CPT OVERGAARD]: He is one of the other doctors that saw  
5   the--psychiatrist that saw the accused at Quantico, ma'am. And I  
6   know on Defense's 20 August 2012 email, they had stated that those  
7   three individuals--the two individuals from Kuwait, Captain  
8   Richardson and Lieutenant Commander Weber, as well as Lieutenant  
9   Colonel Russell are not relevant because they saw him in Kuwait, but  
10   Lieutenant--I think that was just a mistake on the part of the  
11   defense. Lieutenant Colonel Russell was actually one of the treating  
12   physicians at Quantico that saw the accused at the same time that  
13   Colonel Malone did in the April 2011 time-period. So the testimony  
14   of all these--and the information of all these doctors is relevant.

15           And Lieutenant Colonel Russell, as I just stated, saw the  
16   accused at Quantico the same time as Colonel Malone and, at different  
17   occasions, Colonel Russell recommended to the Classification and  
18   Assignment Board, which was the board at Quantico that reviewed the  
19   accused's status--his POI status in particular and his Max status--  
20   and they--and Lieutenant Colonel Russell had recommended that the  
21   accused remain on the POI status on one occasion and he deferred to  
22   the command on determining the POI status on a different occasion.

1               And, again, the testimony of Captain Richardson and  
2 Lieutenant Colonel Weber are potentially relevant because they  
3 treated the accused want he was confined in Kuwait from the beginning  
4 of his confinement there, in June 2010, until when he left at the end  
5 of July of 2010. And the accused was on suicide watch because he was  
6 suicidal during--throughout the time at Kuwait. The information will  
7 show that he created nooses on two separate occasions and he gathered  
8 metal to harm himself.

9               And Lieutenant Colonel Russell, Colonel Malone, and Captain  
10 Hocter all said that they relied on the AHLTA records which were in  
11 the system which the government attached, actually, as an enclosure  
12 for portions of them, to their motion, including those maintained by  
13 the mental health professionals in Kuwait in making their  
14 assessments. In both Colonel Malone and Captain Hocter, the two  
15 Quantico doctors, said that they seem to remember the hand-written  
16 notes that they received in a physical file regarding the accused's  
17 behavior in Kuwait and that they did, in fact, review and rely upon  
18 those as well. And, as we stated, ma'am, the government has not  
19 received or reviewed those at this point.

20               Now, all three of those doctors relied upon the information  
21 provided by Kuwait. They communicated at least some of that  
22 information to brig personnel

1 MJ: Did--was there any oral communication, that you're aware  
2 of, between the doctors in Kuwait and the doctors in----

3 ATC[CPT OVERGAARD]: Oh, no, ma'am.

4 MJ: Okay.

5 ATC[CPT OVERGAARD]: There was no oral communication, that we're  
6 aware of, between the doctors in Kuwait and the doctors at Quantico.

7 MJ: Well, have you been able to ask them those questions and  
8 get those responses or not?

9 ATC[CPT OVERGAARD]: We asked----

10 MJ: I mean, do you know, or were you unaware?

11 ATC[CPT OVERGAARD]: We asked Captain Hocter and Colonel Malone  
12 those questions and we asked Colonel Russell those questions as well,  
13 ma'am. Yes, there was no verbal communication that they--going  
14 between Kuwait and Quantico, that's accurate, ma'am. But the mental  
15 health professionals in Kuwait often spoke with their brig personnel  
16 and, in particular, Master Sergeant Blenis said that Colonel Malone  
17 and Colonel Russell would meet with brig personnel before and after  
18 they met with the accused to find out what had been happening over  
19 the week and just discuss their recommendations, based on their time  
20 with the accuse so it could be incorporated into the classification  
boards. And then, relying upon the recommendations from Kuwait, in  
communicating those to the brig personnel, the brig personnel were  
also relying upon those recommendations, ma'am.

1           And the notes also reveal that the Kuwait personnel  
2   communicated with--the Kuwait psychiatrist communicated with  
3   personnel at the confinement facility in Kuwait. And those  
4   confinement facility individuals inevitably communicated at least  
5   some of that information to the brig personnel in Quantico.

6         MJ: So, how do you know that?

7         ATC[CPT OVERGAARD]: The--according to the AHLTA records, the  
8   doctors, Captain Richardson and Lieutenant Colonel Weber, in Kuwait,  
9   had noted in their AHLTA medical records that they had communicated  
10   at least with Captain Balfour who was the--I guess, medical health  
11   profession in Kuwait--the staff medical health professional. We have  
12   not spoken with Captain Balfour or those two commanders and we don't  
13   know the extent of the communications, we don't know the extent of  
14   the information that was passed, but Master Sergeant Blenis did  
15   receive--according to a conversation with him, the social worker at  
16   Quantico did receive some information from Kuwait, ma'am.

17           And brig personnel, including Master Sergeant Blenis, have  
18   said that they based their POI status determination, at least in  
19   part, on the accused's previous suicide plans as well as the  
20   recommendations of mental health professionals. And the defense even  
21   acknowledges in their motion the relevance of the accused's suicide  
22   watch in the Kuwait confinement facility by stating that Captain  
23   Hocter and Colonel Malone, at Quantico, initially recommended that

1 the accused be placed on suicide watch due to his suicide risk and  
2 then to POI. So, the prosecution contends that they should at least  
3 be able to speak with these doctors that made these recommendations  
4 and have access to these notes that were the basis of the  
5 recommendations.

6 In addition, Captain Hocter stated, during a recent phone  
7 call, that he also kept notes on the hard file--hand-written notes.  
8 And this hard file that the government refers to different than the  
9 AHLTA records. This is hand-written notes which, apparently, contain  
10 both Kuwait hand-written notes and hand-written notes from Doctor  
11 Hocter that the government has not been able to obtain. We did do--  
12 or law enforcement did do a request of all mental health records--or  
13 all medical records for the accused. They did not receive these as  
14 part of that disclosure and now the government is not sure why and  
15 assumes that they may have followed the accused to Leavenworth and we  
16 have not yet ascertained whether or not they exist at Leavenworth,  
17 but would like a court order to receive them since the government did  
18 not receive them in their last request.

19 MJ: Have you asked Leavenworth for them?

20 ATC[CPT OVERGAARD]: Not yet, ma'am. We haven't even  
21 ascertained where exactly they are. We just found out about this  
22 hard file at the end of last week.

23 MJ: All right. Defense, other than relevance, any objections?

1           CDC[MR.COOMBS]: Well, Your Honor, yeah. I'll go through a  
2 response to it. I mean, I think some of the session----

3           MJ: Okay, before you do that--I didn't mean to interrupt--are  
4 you finished or do you----

5           ATC[CPT OVERGAARD]: No, ma'am.

6           MJ: No? Okay. I'm sorry. Go ahead.

7           ATC[CPT OVERGAARD]: Secondly, ma'am, the defense is, in effect,  
8 invoking the privilege by not giving the government a waiver. The  
9 prosecution cannot even obtain the contact information, as I stated,  
10 for Captain Richards and Lieutenant Commander Weber and has been  
11 unsuccessful in even eliciting any testimony from them.

12           So, as stated in the government's motion, the defense has  
13 made the POI status the focus of the Article 13 motion and, at the  
14 same time, will not allow the prosecution access to the witnesses and  
15 the information that would explain why the accused was on that POI  
16 status which was the fact that he created nooses, gathered objects  
17 for self-harm, and was suicidal. And, in addition, at least one of  
18 the doctors in Kuwait stated that he thought the accused was claiming  
19 not to be suicidal just to get out of POI, but that he was suicidal  
20 and awaiting the opportunity.

21           So, what the defense is proposing in not allowing the  
22 government--or not giving the government a waiver is to allow the  
23 prosecution and the Court only access to enough information--enough

1 of the accused's mental health information to try to establish the  
2 point that the defense would like to establish. By trying to limit  
3 that discussion to only the facts that are potentially helpful to the  
4 defense, the defense is deliberately providing the Court with an  
5 incomplete picture of why the personnel at the brig did what they  
6 did.

7 The government has also had brief discussions with Colonel  
8 Malone and Captain Hocter, but has not gone into too much detail  
9 about their treatment of the accused, but when asked if they had some  
10 reservations about speaking with the prosecution, both thought there  
11 was some sort of waiver but were not clear on the extent of the  
12 waiver and what, if any, limits were placed on the discussions with  
13 the prosecution. And although the defense has stated they're not  
14 asserting the 513 privilege, they are, in effect, doing so because  
15 they were not--because they have not given the doctors authority to  
16 speak with the prosecution, which the doctors, apparently, require.  
17 The prosecution has not been able to obtain the information, so the  
18 privilege is, in effect, being invoked by the doctors, if not by the  
19 accused. The doctors are relying upon this privilege. No, in  
20 particular, the government would look to M.R.E. 513(e)(7)----

21 MJ: Well, are the doctors relying on the privilege or are they  
22 relying on HIPAA as going as his----

1           ATC[CPT OVERGAARD]: Well, HIPAA still requires some sort of  
2 waiver, ma'am, from--according to the personnel at Camp Pendleton.

3           MJ: So, you're looking at the view of the instruction, there,  
4 DoD Health Information Privacy Regulation?

5           ATC[CPT OVERGAARD]: Yes, ma'am, and there are provisions in  
6 that DoD Instruction which allow the government to subpoena those  
7 records, but, as stated, the personnel at Camp Pendleton--the  
8 medical--the lawyers for the medical personnel at Camp Pendleton has  
9 been--and said, "It's the Navy's position not to even allow the  
10 government to talk to individuals without a Court order or a waiver  
11 of the accused."

12          MJ: And they're relying on this DoD----

13          ATC[CPT OVERGAARD]: Yes, ma'am, and it's----

14          MJ: ----Instruction 6025.18-R?

15          ATC[CPT OVERGAARD]: Yes, ma'am.

16          MJ: Okay.

17          ATC[CPT OVERGAARD]: And it's a restrictive interpretation of  
18 the DoD Instruction, but that is their interpretation that they  
19 represented to the government in not even giving contact information.

20          MJ: All right.

21          ATC[CPT OVERGAARD]: So, without the--does the Court not want to  
22 hear the 513 argument, then, ma'am?

23          MJ: Certainly.

1           ATC[CPT OVERGAARD]: Okay. Is "certainly" yes? Okay.

2        MJ: I would have said "no" if I meant no.

3        ATC[CPT OVERGAARD]: So, in particular, ma'am, M.R.E. 513(d) (7)

4    says that "when an accused offers statements or other evidence

5   concerning his mental condition in defense, extenuation, or

6   mitigation under circumstances not covered by R.C.M. 706 or M.R.E.

7   302, in such situations, they military judge may, upon motion, order

8   disclosure of any statement made by the accused to a psychotherapist

9   as may be necessary in the interest of justice." And, again, ma'am,

10   the defense has made POI status of the accused the focus of the

11   Article 13 motion by stating the accused should not have been on POI

12   and introducing only statements and testimony of two doctors who at

13   different times recommended the accused be taken off POI. The

14   defense has, in not giving the government a waiver, in essence,

15   offered the accused's mental condition as a defense why the accused

16   should not have been treated in a particular manner while at PTC and

17   limited the government's access to the additional information which,

18   in the interest of justice, the government would contend should not

19   occur. It gives an incomplete picture of what actually occurred of

20   the underlying reasoning that the brig personnel had in making the

21   decisions and determinations that they did. And, also, it just

22   paints an incomplete picture of why the accused was on suicide watch

23   and why he was on POI, ma'am.

1               In addition, the accused waived a privilege--his 513  
2 privilege under 510. When a person waives privilege by voluntarily  
3 disclosing or consenting to disclosure of any significant part of the  
4 matter or communication under such circumstances that it would be  
5 inappropriate to allow the claim of privilege. Now, here, the  
6 accused has waived his privilege in regard to all information in the  
7 relevant time period of Captain Hocter and Colonel Malone by  
8 providing affidavits of them regarding their treatment of the accused  
9 and when they call them to testify in their proper testimony of the  
10 two psychiatrists.

11               The accused has also waived to the privilege in regard to  
12 Colonel Russell by waiving the privilege for the treating physicians  
13 that occurred at the same time as Lieutenant Colonel Russell by  
14 putting the accused's mental health status for his entire time in PTC  
15 in issue. It would be inappropriate to allow the accused to claim a  
16 privilege to only those matters which do not support the accused's  
17 claim that there is no reason for him to be placed on POI when he had  
18 previously created nooses and admitted that he was suicidal. By  
19 trying to limit the discussion to only facts that potentially  
20 relevant and helpful to the defense, the defense is deliberately  
21 providing a limited and incomplete picture to the Court.

22               And, ma'am, this is----

23               MJ: I'm hearing a cell phone. All right. Proceed.

1           ATC[CPT OVERGAARD]: Ma'am, this is why the government would ask  
2 for the court order and actually has attached a draft court order to  
3 their request for the order.

4           MJ: All right. Thank you.

5           CDC[MR.COOMBS]: Okay, Your Honor, I think--first of all, the  
6 government--reading their motion, they make several claims that  
7 they're not able to present certain evidence. The government is free  
8 to speak with any of the mental health professionals on the defense's  
9 witness list. So, we ask them to ask the questions they wanted if  
10 they--if one of the witnesses refused to answer, we would inform them  
11 that they have to answer the question. So---

12          MJ: Well, first of all, is there an objection to issuing the  
13 court order?

14          CDC[MR.COOMBS]: In this instance, for Colonel Malone, Captain  
15 Hocter, Captain Moore, I don't believe there is a need for the court  
16 order because the defense is unaware of any of those witnesses  
17 refusing to answer a question.

18          MJ: Then why isn't the defense giving them a waiver?

19          CDC[MR.COOMBS]: The defense has indicated they would if there  
20 is--if it's needed. I've informed--each one of them has a HIPAA  
21 waiver right now and I've informed them that "You're on our witness  
22 list. As part of being on our witness list, the government is going  
23 to contact you. You have to answer their questions."

1 MJ: So, if I issue a court order, what's the defense objection  
2 if it's going to accomplish the same thing that you've just said?

3 CDC[MR.COOMBS]: I--none. I mean, I just don't think there's a  
4 need for that, but----

5 MJ: Okay. What about Dr. Russell?

6 CDC[MR.COOMBS]: With regards to Lieutenant Colonel Russell,  
7 again, he saw--a couple things for him--he saw PFC Manning in April  
8 of 2011; the last month that he was at Quantico. And what the  
9 government has are his two evaluations and, in which case--and both  
10 of them he says, "The Soldier is not a danger to himself or others,"  
11 the government represents that he said he was a suicide risk and  
12 they're--want to juxtapose him, apparently, for his limited time of  
13 seeing him in one month against Captain Hocter and Colonel Malone  
14 who've seen him for the other 8 months combined.

15 Clearly, anything that the brig considered is relevant, so  
16 his reports are certainly relevant. And the fact that he was there--  
17 if he spoke to anybody, clearly, that would be relevant, but nowhere  
18 in the government's motion do they articulate anything about Russell  
19 other than the false statement they--the inaccurate statement that  
20 they've put on page six of their motion. So, there is no stated  
21 basis for relevance of Lieutenant Colonel Russell coming to testify.

22 MJ: Well, he was a treating psychiatrist and he was making  
23 recommendations to the brig. Is that correct, or not?

1           CDC[MR.COOMBS]: He--yes, ma'am, he stood in for Colonel Malone  
2 when Colonel Malone was out so he saw Manning on two occasions in  
3 April and he made two recommendations. Certainly, whatever the brig  
4 considered--because that's the issue: whatever they considered for  
5 the POIs----

6           MJ: Yes.

7           CDC[MR.COOMBS]: ----so, if it is such that Lieutenant Colonel  
8 Russell, then, also spoke with anybody, then I think it would be  
9 relevant; certainly. If all that happened was these reports, then I-  
10 -you know, these reports should be the things that are relevant.

11          MJ: The government doesn't know because the doctor won't talk  
12 to them.

13          CDC[MR.COOMBS]: Now, I don't believe Colonel Russell has  
14 refused. I mean, if that's the case, then he needs the HIPAA release  
15 or something like that, we'll give him that or the court order which  
16 is perfectly fine. With regards to Captain Richardson and Lieutenant  
17 Commander Weber, both of them saw PFC Manning in July of 2010; one  
18 from 2 July to 28 July, that's Captain Richards, and Lieutenant  
19 Commander Weber from 6 July to 27 July of 2010, while in Kuwait.  
20 They're simply not relevant to anything that the brig did other than  
21 whatever the brig considered. And what the brig considered was the  
22 documentation that both of those psychiatrists produced which is what  
23 Captain Hocter considered and what Captain Hocter used in order to

1 initially indicate that PFC Manning should be held under suicide risk  
2 at the very beginning.

3 MJ: Do you or the government know if there was any--the  
4 government cited additional communication between the psychiatrists  
5 at Kuwait, maybe, down to the brig personnel that maybe migrated  
6 over. I guess where I'm looking at this is, is there a difference  
7 between having a court a order for these people to talk to the  
8 government and say, "Hey, I didn't talk to anybody at Quantico," then  
9 your point of not being relevant is accurate because Quantico didn't  
10 rely on anything they said.

11 CDC[MR.COOMBS]: Right.

12 MJ: However, if there is some way that some of the oral  
13 communication made it from the psychiatrist in Kuwait to Quantico,  
14 there could be potential relevance.

15 CDC[MR.COOMBS]: I would 100 percent agree with that. The  
16 government represented, and I believe it's accurate, that neither  
17 Captain Richardson or Lieutenant Commander Weber ever spoke to  
18 anybody at Quantico. What Quantico got was their documentation and  
19 that's what precipitated PFC Manning being moved from Quantico--or,  
20 excuse me, from Kuwait to Quantico.

21 MJ: What about those hand-written notes that the government was  
22 discussing?

1           CDC[MR.COOMBS]: Right. I think those are notes--I think the  
2 mental health professionals do their own notes that are separate and  
3 apart from this and, certainly, anything that the brig considered--if  
4 the brig considered those, 100 percent agree, because the issue at  
5 this Article 13 is the brig's determination of POI. The government  
6 is going to want to try to say it is based upon these factors and it  
7 was non-punitive. We're going to try and say that they didn't even  
8 care about that, it was these other factors that are not legitimate.  
9 So, the issue, here--and the fatal flaw of the government motion is  
10 they have to at least say this is something that Chief Averhart or  
11 Chief Barnes or the classification assignment board considered. The  
12 defense would concede, if it's something they considered, then the  
13 government should have access to it. So, if Blenis says, "Hey, I  
14 spoke personally with Captain Richardson," the defense would concede  
15 that Captain Richardson, then, is relevant for whatever he said to  
16 Blenis. But there's no evidence of that at this point.

17           So, with regards to Richardson and Weber, the fatal flaw in  
18 their logic is they're not being prevented from presenting what  
19 Quantico considered. Quantico considered the documentation which is  
20 what Captain Hocter considered the government is free, then, to use  
21 that same documentation with Chief Averhart, Barnes, Blenis, Papakie,  
22 whoever they call to say, "How did this factor into your  
23 determination?"

1 MJ: Without a court order, the government is precluded from  
2 finding Captain Richardson and Lieutenant Commander Weber and asking  
3 them what they--what, if anything, they told Quantico.

4 CDC[MR.COOMBS]: No, I think that's eminently reasonable. If  
5 the government's position is: "We believe there's evidence that  
6 these two individuals spoke to someone at Quantico," I would think  
7 they could find a person at Quantico that would say, "Yeah, I spoke  
8 to him." But, if the easier course of conduct is to get the court  
9 order to have them answer that question, "Did you speak to anybody at  
10 Quantico? If so, who and what did you tell them?" the defense would  
11 100 percent agree. If they said anything to a person at Quantico and  
12 they gave any sort of information to them, then the basis of what  
13 they gave would be something that they could come testify to and  
14 that's understandable.

15 With regards to the--I guess the other motivation of the  
16 government--their motion ends with "the court order should apply to  
17 all mental health professionals from 30 June 2009 to present day."  
18 So, now, they're, apparently, wanting to go to--because there's some  
19 evidence that PFC Manning saw mental health professionals prior to  
20 the deployment. So----

21 MJ: So, the government's motion is from----

22 CDC[MR.COOMBS]: 30 June 2009 to the present day. So, in other  
23 words, here is, I think, their 513 issue that they're trying to

1 inform the Court of. "Hey, because we've raised an issue that  
2 Quantico did not have a non-legitimate--or a legitimate, non-punitive  
3 objective in keeping him in POI, now, somehow, we've raised mental  
4 health as a defense and, therefore, the 706 board is fair game for  
5 them to go after, any mental health professional he saw prior to the  
6 deployment is fair game for them to go after," that's what that  
7 sentence appears to suggest to the defense.

8 Again, the issue, here, is: what did Quantico have in  
9 front of them to consider and what did they consider in making the  
10 determination that he should be held on Max and POI. And the defense  
11 would concede that--what--the people we listed, they have full reign  
12 and access to and they should have the ability to ask them any  
13 question they want and if any of my doctors have a written--something  
14 that hasn't been produced already in discovery, they should have it  
15 and we would support a court order for that.

16 With regards to Richardson and Weber, until--unless they  
17 can suggest some connection to show that the brig relied upon oral  
18 statements from the two of them, then all it is is the documentation  
19 and, obviously, any documentation they should have access to and they  
20 do because we got it from them. So, we would support a court order  
21 if that's the easiest way for Weber and Richardson to respond to that  
22 question: "Did you talk to anyone at Quantico? If so, who and what  
23 did you tell them?"

1                    Regards to the other government request of this Court's  
2 order should be so broad as to say that anything from 30 June 2009 to  
3 present day--meaning, potentially, even the defense's, you know,  
4 expert--mental health expert who is seeing Manning at this point or  
5 anyone else who have seen Manning, that, I think, obviously, is way  
6 overbroad at this point.

7                    MJ: Well, Mr. Coombs, you're getting a witness who is  
8 testifying from Leavenworth--Fort Leavenworth that, immediately after  
9 PFC Manning went from Quantico to Fort Leavenworth----

10                  CDC[MR.COOMBS]: Right.

11                  MJ: ----he was put into the general population and all of that.  
12 Would there have been a mental health professional involved, at least  
13 at the beginning, there?

14                  CDC[MR.COOMBS]: Sure. I think that it's--well, it is--  
15 Lieutenant Colonel Hilton will testify as the JRCF Commander that  
16 part of the indoctrination process is mental health. So, there's the  
17 mental health professional that sees him, there, talks to him,  
18 review--you know, does an assessment of him. He goes through--kind  
19 of similar to the brig in that he goes through an indoctrination  
20 process and then there's recommendations that are made. Unlike the  
21 brig, it's not the commander who makes the final say, the commander  
22 is the appellate authority; it's basically her XO who makes the

1 determination. But, yeah, there's a mental health aspect to that,  
2 certainly.

3 MJ: But at least at this point, the defense is calling  
4 Lieutenant Colonel Hilton? I haven't looked at the myriad----

5 CDC[MR.COOMBS]: Yes.

6 MJ: ----of enclosures that we have coming, but am I getting any  
7 from Fort Leavenworth that involve mental health?

8 CDC[MR.COOMBS]: No, ma'am.

9 MJ: Okay.

10 CDC[MR.COOMBS]: Now--see, that kind of goes back to--this is  
11 kind of the inconsistent argument that the government is making in  
12 other motions. They've argued that, initially, we're calling Hilton  
13 in order to second-guess the decision of Quantico in order to say  
14 that he should not be held in POI. That was not why we were calling  
15 her but they want to call mental health professionals prior to his  
16 time there--ever there in order to second guess the mental health  
17 professionals that are there. If the brig considered, you know,  
18 testimony from these people, then I think that's fair. If it's just  
19 the documentation, then the documentation is what's relevant, nothing  
20 else.

21 MJ: All right. I understand your position.

22 CDC[MR.COOMBS]: So, subject to any other questions, ma'am----

23 MJ: I think I've asked them. Thank you.

1           CDC[MR.COOMBS]: Thank you, ma'am.

2           MJ: Captain Overgaard?

3           ATC[CPT OVERGAARD]: Can I just have one minute, Your Honor?

4           MJ: Yes.

5           ATC[CPT OVERGAARD]: In regard to the Kuwait mental health  
6 professionals, ma'am, the government would like to explore with them-  
7 -not only did they talk to anyone from Quantico, directly, but the  
8 extent of information that they may have relayed to their personnel  
9 at the confinement facility who may have relayed that information to  
10 the personnel at the Quantico brig.

11          MJ: Does the government--the defense posited both in the email  
12 and here, in oral argument, that what if any communication, records,  
13 from the Quantico psychiatrists--that migrated to Quantico in some  
14 way, shape, or form is relevant.

15          ATC[CPT OVERGAARD]: Yes, ma'am.

16          MJ: But, if--say, for example, Captain Richardson was going to  
17 come in and say, "Well, during a--I didn't say anything to Quantico  
18 about any of this, but in my opinion, this should have been done or  
19 that should've been done," is the government intending to elicit any  
20 of that?

21          ATC[CPT OVERGAARD]: No, ma'am, that's not the intention. The  
22 intention is to, one, to look at the information that was reported  
23 and conveyed to Quantico because that will be relevant to Quantico's

1 determination, and, in addition, in the Article 13 motion, the  
2 defense has alleged that Private First Class Manning's demeanor  
3 changed and Quantico did some harm to the accused; that he acted a  
4 certain way because of Quantico. So, the government also thinks they  
5 should be able to test, with the Kuwait mental health professionals,  
6 how they perceived the accused's behaviors before he went to  
7 Quantico.

8 MJ: Okay. Now, how about--you have that final sentence that  
9 the defense did raise that it should be from--is it 2009 to the  
10 present?

11 ATC[CPT OVERGAARD]: Yes, ma'am

12 MJ: What is the relevance of anything prior to Kuwait?

13 ATC[CPT OVERGAARD]: The 30 June 2009 date was one of the early  
14 dates the government saw in the mental health--or in the medical  
15 records relating to mental health and the doctors at Quantico said  
16 they reviewed the accused's mental health records. So, the  
17 government would assume that they reviewed all the mental health  
18 records. The government did not ask that question, if they went as  
19 far back as July of 2009, but----

20 MJ: You didn't ask that question of who?

21 ATC[CPT OVERGAARD]: Of Colonel Malone, Lieutenant Colonel  
22 Russell, or Captain Hocter, the Quantico doctors, ma'am. But those

1 doctors all said that they reviewed the accused's medical records and  
2 those were in the accused's medical records.

3 MJ: Okay. And do you have them or you don't have them?

4 ATC[CPT OVERGAARD]: We have those records, ma'am, yes. The  
5 government is also requesting that they be able to explore any  
6 potential normal behavior from the accused that established the norm  
7 since the defense is contending that his behavior had changed  
8 drastically at Quantico, compared to how it was at the JRCAF at  
9 Leavenworth. So, we should be able to establish a norm with any of  
10 these earlier doctors, as well, of what his behavior was like and if  
11 Quantico did, in fact, as defense is contending, have any sort of  
12 impact on his behavior.

13 MJ: Where in the defense motion--what is the defense intending--  
14 --or on--introducing that Quantico did have a negative impact? Maybe  
15 I'm wrong; I read the motion to say that it could, but didn't.

16 ATC[CPT OVERGAARD]: One moment, please. Ma'am, we may need a  
17 little more time since will have to scan through the 110 pages. Can  
18 we have a----

19 CDC[MR.COOMBS]: Ma'am, the defense will say that your  
20 understanding is correct. We said that it could have caused damage  
21 to him, but didn't, based upon the type of person that he was and the  
22 treatment that he was receiving from Captain Hocter. The difference  
23 between Quantico and the JRCAF that we highlight is the fact that, at

1 Quantico, he was held in Max POI, considered all this a problematic  
2 issue, and then at the JRCAF, after completing the normal  
3 indoctrination process, he was placed in medium custody. So, there's  
4 not a, like, normal behavior, non-normal behavior at all--issue.  
5 And, again, if the government can point to the Quantico officials--  
6 because the issue they're having to address is: why did Quantico  
7 place him in Max and POI for 9 months--or suicide risk? And it's  
8 whatever they consider; that's totally, 100 percent relevant. The  
9 other stuff that "we want to talk to a doctor to establish some  
10 normal behavior back in 2009 or normal behavior at some other time or  
11 we want to talk to some doctor, you know, who might have saw him as  
12 late as a month ago to establish normal behavior," that has nothing  
13 to do with the brig's decision. The brig makes a determination based  
14 upon, presumably, what they see and what they review. The government  
15 is free to raise that information.

16 MJ: Well, Mr. Coombs, again, I'm going to have to go look  
17 through the filing as well as the additional filing to see--and the  
18 government can maybe point this out to me--if there's any--if the  
19 defense is alleging, in any way, that PFC Manning was punished under  
20 Article 13 because these onerous conditions caused a mental decline--  
21 I believe there's something in here from a psychiatric association  
22 saying that, by putting somebody--it's an attachment, there--by

1 putting somebody in this kind of condition, it causes a mental  
2 decline.

3 CDC[MR.COOMBS]: Yes, ma'am, there is and that is the case.  
4 Solitary confinement--normal individuals go downhill quite quickly  
5 and get broken. PFC Manning--Captain Hocter will testify to this--  
6 was surprisingly resilient. He did well, based upon the treatment  
7 that he was receiving; so well so that he made the recommendation  
8 early on to take him off the suicide risk and then, ultimately, to  
9 take him off the POI. So, that's not--you know, the defense's motion  
10 just highlights the indifference. That's the aspect, I guess, that  
11 we raise that and the indifference to the potential to cause harm.  
12 And we say that indifference was based upon improper motive as  
13 opposed to a legitimate----

14 MJ: So, is the defense, during the Article 13, going to bring  
15 in any evidence or argument that these conditions actually caused  
16 decline or caused a change in behavior for PFC Manning?

17 CDC[MR.COOMBS]: No, Your Honor. And, in fact, that was kind of  
18 the catch-22 position that he was found in. If the conditions caused  
19 the decline in behavior and decline in his mental abilities, that  
20 would have been further support for them to keep him in suicide risk  
21 or POI, but it's just the contrary. As the defense points out, month  
22 after month after month, he was getting consistent reviews where it  
23 was basically, "Hey, he's doing fine, no disciplinary issues." The

1 mental health professionals were consistently making their  
2 recommendations. There are two times in which his behavior caused an  
3 outburst which those are well-documented. And, in those instances,  
4 PFC Manning indicated the frustration that he was feeling based upon  
5 not being able to get off of POI. So, I guess in that instance there  
6 would be some evidence, but other than, no, Your Honor.

7 MJ: All right. Captain Overgaard?

8 ATC[CPT OVERGAARD]: Ma'am, the government was just looking at  
9 the defense's requested Article 13 witnesses and for Lieutenant  
10 Commander Moulton, the defense proffers his testimony as, "He will  
11 testify concerning the effects of, what they allege as, solitary  
12 confinement on the accused's psychological well-being--or on the  
13 psychological well-being of those subjected to it and PFC Manning,  
14 specifically." And he goes on to say that "Lieutenant Commander  
15 Moulton will testify how these conditions likely placed PFC Manning  
16 at an increased risk of exacerbating any existing psychiatric  
17 symptomology or condition."

18 MJ: Okay. Where are you looking?

19 ATC[CPT OVERGAARD]: The is Defense Requested Witnesses for the  
20 Article 13 Motion, dated 3 July 2012.

21 MJ: Okay.

22 CDC[MR.COOMBS]: Your Honor, Colonel Malone and Captain Hocter  
23 will testify similarly that having him in that condition placed him

1 at risk based upon the onerous nature of being in solitary-like  
2 confinement. The--what Lieutenant Commander Moulton will testify to  
3 is the general impact of that and then, on PFC Manning, he'll be  
4 talking about the instances of frustration that are documented; both  
5 the 18 January and then also the 2 March, where he indicated, "Look,  
6 if I wanted to harm myself, I could do something with the elastic of  
7 my underwear," and then that was used to, then, remove all of his  
8 clothing. And, at the time, Colonel Malone will say that he was not  
9 indicating that he desired to harm himself or an attempt to do so,  
10 but simply intellectualizing the frustration of his confinement  
11 condition. So, we're not going to be offering any evidence to say  
12 that Quantico caused him to deteriorate; just the opposite. He  
13 wasn't broken by it, he continued to be fine, so much so, again,  
14 that, consistently, the mental health professional from the brig  
15 recommended removing him from POI.

16 ATC[CPT OVERGAARD]: That was Appellate Exhibit 181, ma'am, and,  
17 specifically, paragraph 1(e).

18 MJ: All right. What is the government--when you said "to  
19 date," is the government intending on going into the particulars of  
20 the--was there an R.C.M. 706 board in this case, by any chance?

21 ATC[CPT OVERGAARD]: No, ma'am.

22 MJ: Well, hold on. Okay. Let me--okay. Was there an R.C.M.  
23 706 board in this case?

1           CDC [MR.COOMBS]: Yes, ma'am.

2           MJ: Okay. Does the government intend on----

3           ATC[CPT OVERGAARD]: No, ma'am, unless the defense waives it by  
4 calling witnesses and asking questions relevant to the 706, then, no.

5           MJ: Okay. Because you do have a sentence in your request for a  
6 court order that--I believe it says, "Everything that--all the mental  
7 health records to date." What are you looking for after the Quantico  
8 period?

9           ATC[CPT OVERGAARD]: One moment, Your Honor.

10          MJ: It'll be right above your conclusion, there, on page seven.

11          ATC[CPT OVERGAARD]: Basically, ma'am, we're just looking for  
12 Lieutenant Commander Moulton who was on the witness list for the  
13 defense who I just read his proffered testimony a minute ago--about  
14 the alleged detrimental impacts that----

15          MJ: Now, it's the government producing him as a witness or is  
16 this one of the ones you're objecting to?

17          TC[MAJ FEIN]: Your Honor, this is from the original witness  
18 list, Appellate Exhibit 181, that's already been litigated and that  
19 was not contested that the defense submitted on 3 July 2012.

20          MJ: So he was--this is--so he was

21          CDC [MR.COOMBS]: He is a defense expert, Your Honor, that was  
22 appointed to the defense team. It's a--he'll be coming to testify  
23 for what the defense proffered. Obviously, the government is free to

1 talk to him. The--I guess the--any sort of physical notes that he  
2 may have, in this instance, again, would be irrelevant if it's not  
3 something Quantico considered. He had no interplay with Quantico.

4 MJ: So, it could be used to cross-examine him or----

5 CDC[MR.COOMBS]: Certainly.

6 MJ: ----his----

7 CDC[MR.COOMBS]: Yeah, so any notes that are relevant to his  
8 testimony, then, yes, that would be relevant.

9 MJ: Okay. I'm going to ask the government, one more time, with  
10 respect to records after Quantico and mental health treatment after  
11 Quantico--I understand you have Lieutenant Commander Moulton?

12 ATC[CPT OVERGAARD]: Yes, ma'am.

13 MJ: What else are you--she wants a court order--I'm not giving  
14 you a generic court order----

15 ATC[CPT OVERGAARD]: Yes, ma'am.

16 MJ: ----to all mental health professionals. If I decide to  
17 give them, it will be narrowly tailored to each particular doctor.

18 ATC[CPT OVERGAARD]: The government will just be looking for  
19 Lieutenant Commander Moulton.

20 MJ: Okay. So, doctors--the government's basically looking for  
21 a court order for Colonel Malone----

22 ATC[CPT OVERGAARD]: Yes, ma'am.

1 MJ: ----Colonel [sic] Hocter, Lieutenant Colonel Russell--is  
2 that----

3 ATC[CPT OVERGAARD]: Yes, ma'am, Lieutenant Colonel Russell.

4 MJ: ----Captain Richardson, Lieutenant Commander Weber--and do  
5 I have a note in here--who is Lieutenant Colonel Hilton? Did I----

6 ATC[CPT OVERGAARD]: No, ma'am, that's not a mental health  
7 professional.

8 MJ: Okay. Any other mental health professionals?

9 ATC[CPT OVERGAARD]: No, ma'am, that's all.

10 MJ: All right. And then, Defense, just to make sure I'm clear,  
11 I got your email; you're not asserting a privilege----

12 CDC[MR.COOMBS]: That is correct, Your Honor.

13 MJ: ----under M.R.E. 513?

14 CDC[MR.COOMBS]: That is correct, Your Honor. And with regards  
15 to Captain Richardson and Lieutenant Commander Weber, we would just  
16 simply say anything that they actually communicated orally would be  
17 relevant and the order should give the government the opportunity if  
18 that's the person they want to go to directly to say, "Did you talk  
19 to anybody?" That would be the scope of that order and then,  
20 presumably, if they received information, they would come back to the  
21 Court.

22 MJ: All right. Thank you. Based on that--all right.  
23 Government, I'm going to grant your motion with respect to the

1 doctors that we just described; that would be Dr. Malone, Dr. Hocter,  
2 Dr. Russell, Dr.--Captain Richardson, Lieutenant Commander Weber, and  
3 Lieutenant Commander Moulton. Please prepare individually-tailored  
4 court orders for each of them.

5 ATC[CPT OVERGAARD]: Yes, ma'am.

6 MJ: And with respect to Captain Richardson and Lieutenant  
7 Commander Weber, what, if anything, they'll be able to testify to is  
8 a different story than what the government can ask them and we can  
9 address that at the actual Article 13 session, whenever that may be.

10 CDC[MR.COOMBS]: All right. So, with regards to that, ma'am, we  
11 would just simply request that if the government intends--once they  
12 talk to those two--to list them as a witness, then some proffer as to  
13 what they're going to testify to where, then, we can object to  
14 relevance, or, I guess, just to indicate--it could--because if they  
15 indicate to us that--you know, say, for example, Lieutenant Commander  
16 Weber had lengthy conversations with, you know the commander at  
17 Quantico, you know, Chief Averhart, then we, probably, would contest  
18 the relevance of that testimony. So, just something so we can  
19 indicate--or know whether or not we're going to contest relevance.

20 MJ: Okay. That's fine. And, again, relevancy can--the  
21 relevance determination can change depending on what happens during  
22 the motion and what's presented by either side. All right.

1           ATC[CPT OVERGAARD]: Your Honor, if I may, the government  
2 finally did find a relevant paragraph to the Article 13 motion; page  
3 76, paragraph 149. The defense contends that not only did the brig  
4 ignore the repeated recommendations to remove PFC Manning from POI,  
5 they also ignored medical opinions that POI was actually causing PFC  
6 Manning psychiatric harm. So, again, this--the defense has what his-  
7 -his mental in issue, including what it was like before.

8           MJ: So what kind of a court order are you looking for from me?  
9 Who is the doctor that treated him in June 2009?

10          ATC[CPT OVERGAARD]: We have their names in the medical records,  
11 ma'am.

12          CDC[MR.COOMBS]: Ma'am, that paragraph section is regards to  
13 Captain Hocter and Colonel Malone, which they're free to talk to,  
14 where they both indicated that the confinement conditions, based upon  
15 how lengthy and how they were going on, could cause harm to him and  
16 that was why he had the incident on 18 January and 2 March; both of  
17 those were based upon frustration of being held in that. But we're  
18 not going to offer testimony from either one of those to say, "And  
19 here is the exact mental health problem." It's more of he was held  
20 in this for month after month and two--only two times in that entire  
21 time did he have an outburst regarding how he was being treated and  
22 both of those the mental health professionals will testify were due

1 to the frustration and trying to intellectualize his frustration with  
2 his custody status.

3 MJ: All right. Then that would still make--if there were  
4 similar types of reactions back in June of 2009 that weren't caused  
5 by that, that would be relevant. So, I'm going to allow the  
6 government--Government, if you find--if you want to go explore back  
7 to 2009, I'll sign court orders that let you do that.

8 ATC[CPT OVERGAARD]: Yes, ma'am.

9 MJ: But, after Quantico and after the brig, at least at this  
10 point, I haven't seen anything that's relevant.

11 ATC[CPT OVERGAARD]: Besides Lieutenant Commander Moulton,  
12 ma'am?

13 MJ: Yes.

14 ATC[CPT OVERGAARD]: Yes, ma'am.

15 MJ: All right. It's 1600. We have two additional issues that  
16 we said we were going to go forward with today. If the parties are  
17 ready to do that, we can, otherwise we can do that in the morning;  
18 those are the closure issue with respect to the M.R.E. 404(b) and the  
19 computerized logs. Do the parties have a preference either way?

20 TC[MAJ FEIN]: Your Honor, the government offers that we do move  
21 forward, but take a 15-minute recess before we continue.

22 MJ: All right. On both issues?

23 TC[MAJ FEIN]: Yes, Your Honor.

1 MJ: All right. Defense?

2 CDC[MR.COOMBS]: No objection, Your Honor.

3 MJ: All right. Let's do that. 15 minutes? Court will be in  
4 recess until a quarter after four.

5 [The Article 39(a) session recessed at 1604, 28 August 2012.]

6 [The Article 39(a) session was called to order at 1624 28 August  
7 2012.]

8 MJ: This Article 39(a) session is called to order. Let the  
9 record reflect all parties present when the Court last recessed are  
10 again present in court. All right. Why don't we begin with the  
11 M.R.E. 404(b) closure motion.

12 Before we do that, the counsel and I met in an R.C.M. 802  
13 conference way earlier today and the government had advised the Court  
14 that it intended to supplement that notice to the defense with an  
15 additional M.R.E. 404(b) act, is that correct?

16 ATC[CPT OVERGAARD]: Ma'am, the government did state that,  
17 however, based on information that the defense provided in the 802,  
18 the government is, perhaps, not going to do that but hasn't been able  
19 to fully review the information yet and will advise the defense and  
20 the Court later tonight.

21 MJ: All right. And I'm looking at the Prosecution Motion for  
22 Preliminary Determination of Admissibility under M.R.E. 404(b)  
23 Evidence, dated 3 August 2012, that's Appellate Exhibit 250, and the

1 defense reply, which is Appellate Exhibit 251, with a CD enclosure to  
2 it.

3 ADC[MAJ HURLEY]: Ma'am, the defense reply doesn't have a CD  
4 enclosure. Is that the CD enclosure for the prosecution?

5 MJ: It says, "Defense Reply." I believe that's the audio that  
6 you were referencing.

7 ADC[MAJ HURLEY]: That's right, ma'am, and thank you so much for  
8 reminding me of that. Your Honor, the portion of this motion that  
9 I'm here this afternoon to discuss is closing the Court with respect  
10 to the second two instances of other crimes, wrongs, or acts, as  
11 indicated by the government.

12 In my motion, I request the Court close for all--for its  
13 consideration of all of the crimes, wrongs, or acts, pursuant to our  
14 discussion, today, Your Honor, in the 802 session, I would like to  
15 just tailor that to the second two instances described by the  
16 defense.

17 MJ: So, the first instance, you don't have an issue with it  
18 just being discussed in its entirety?

19 ADC[MAJ HURLEY]: That's correct, ma'am----

20 MJ: All right.

21 ADC[MAJ HURLEY]: ----in open court.

1 MJ: And, just going further, just so we don't have to do this  
2 again, should the government go forward with their additional basis,  
3 you would request closure for that one as well?

4 ADC[MAJ HURLEY]: Yes, ma'am.

5 MJ: Okay.

6 ADC[MAJ HURLEY]: And, ma'am, we would just point the Court to  
7 R.C.M. 806(b)(2) and the four-prong test and that must be satisfied  
8 to determine if the Court can, legitimately, be closed. And the--we  
9 would submit to you that there's a--the substantial overriding  
10 interest that PFC Manning has in this case is a trier of fact that's  
11 free from bias and that consideration, in open court, of those second  
12 two matters that were averred by the prosecution in their motion  
13 would have the tendency to bias the potential members in the--or  
14 individuals that would compose the trier of fact and that we would  
15 request the Court be closed with respect to that. And, again, when  
16 you consider the second prong of the R.C.M. 806(b)(2) inquiry,  
17 "closures no broader than is necessary," so, as we've gone through,  
18 even today, eliminating the testimony or the information from Mr.  
19 Madrid, skipping over that and allowing that to be assessed in open  
20 court, we would just want to focus on those two aspects of the  
21 prosecution motion--that are left in their motion.

22 The reasonable alternatives to closure, ma'am, are 6 months  
23 out, at least, from having this case heard by a trier of fact, even

1 by the--5 1/2. In that, forgive me, Your Honor, I was a College  
2 English major; the math is somewhere around that. And the  
3 alternatives that the Court has--that we have, as defense counsel, to  
4 address this information as it might be discussed in open court just  
5 won't scour with the calendar that we have in this case and the  
6 restrictions that we have in this case. We can't go to any members--  
7 potential members and say, "Ignore the media for the next few  
8 months." I mean, that's just--that's onerous on them if they may  
9 want to be informed in--just in their lives, generally.

10 MJ: Let me ask you a question on that. In your motion, you  
11 discussed that there has been extensive media coverage based on some  
12 hits on a website.

13 ADC[MAJ HURLEY]: Yes, ma'am.

14 MJ: Is that the extent of the media coverage that the---

15 ADC[MAJ HURLEY]: Oh, no, ma'am, I----

16 MJ: ----has occurred in this case?

17 ADC[MAJ HURLEY]: ----apologize. What I was trying to describe  
18 is, generally, the intensive scrutiny that this case has received  
19 and, in doing that, I just typed in my client's name, Bradley  
20 Manning, Army, into a Google search to see how many hits were there  
21 and, as I looked through it, it was not only AP or wire service  
22 reports, nationally, and how those reports were picked up, locally,  
23 by different media outlets--local media outlets, but also

1   internationally and that's--in an attempt to describe to the Court  
2   the international media attention that this case has garnered, that's  
3   what the point of that factual information is.

4           MJ: Okay.

5           ADC[MAJ HURLEY]: And--now, I was concluding my remarks, ma'am,  
6   on reasonable alternatives to closure. They just don't--they don't  
7   work with respect to this particular case and the calendar that we  
8   have in this particular court-martial and the restrictions that we  
9   have. For instance, there has been some discussion about the court-  
10   martial convening order and whether or not it would be changed from  
11   now until the trial date. The government has indicated that it will  
12   not be and there will be some changes. So--because of the PCS  
13   season--so, managing those changes--I see the Court may have a  
14   question.

15          MJ: I'm looking at alternatives, Major Hurley, because closure  
16   is a drastic remedy that's rarely employed and the Supreme Court has  
17   been pretty vociferous about that.

18          ADC[MAJ HURLEY]: Unforgiving.

19          MJ: Is it necessary for the parties to specify the underlying--  
20   the actual factual basis of the statements or the acts in order to  
21   litigate this motion to the legal basis of admissibility or non-  
22   admissibility?

1           ADC[MAJ HURLEY]: We, nonetheless, have come before you this  
2 afternoon to ask for closure because I think it's going to make it--  
3 having closure--or having the Court be closed and discussing this is  
4 going to make it clear which instances that we're talking about so we  
5 don't have to use a code that we would develop, as parties to this  
6 court-martial--that we could just say exactly what we mean so that  
7 there's no doubt in our communications with you and you're ultimately  
8 deciding this motion. Are there alternatives? Yes. And those  
9 alternatives would be--and I think we discussed it, briefly, in the  
10 802--some form of code so that we can dial in on which of these two  
11 instances of conduct that we're talking about in any given instance.

12          MJ: Well, we can just talk about instance one, first, without  
13 referencing the specifics of it and then say why you believe it's  
14 admissible or not admissible under M.R.E. 404(b) and then shift over  
15 to the next one. Why--do you think that that can't work?

16          ADC[MAJ HURLEY]: Well, ma'am, my concern would be a  
17 miscommunication among counsel as we're arguing to you, from you as  
18 you're arguing back to us and will that--that code, whatever we rely  
19 on, instance one, instance two, some greater factual description,  
20 won't allow us to mutually understand what's happening. It's a  
21 concern for confusion among the parties, here, inside the bar; that's  
22 why we, nonetheless, ask the Court to close in its consideration of  
23 the second and third, ma'am. The Court's hit upon an alternative

1   that's reasonable and, certainly, as I close my argument, I was going  
2   to discuss this alternative and that is using some coded language in  
3   order to avoid this drastic, to use your words, ma'am, "remedy" of  
4   closing the Court; certainly, that is an alternative that's out  
5   there. Because of a need for clarity amongst the parties and to be  
6   specific when we're talking about exactly what's required, that's why  
7   we would--I would urge closure.

8                 Additionally, when we get into a description of whether or  
9   not this qualifies under 404(b), we're going to have to, to a degree,  
10   talk about the facts. I would be surprised if we could use coded  
11   language because we're going to say, "This fact means this." The  
12   government, as a proponent of this evidence, is going to have to say,  
13   "This--these--this factual basis, this instance qualifies for  
14   knowledge from the accused or qualifies for intent or whatever." And  
15   there's----

16                 MJ: And I have the written pleading, right here, that tells me  
17   what it is.

18                 ADC[MAJ HURLEY]: Yes, ma'am, but, as we communicate with you,  
19   the concern from the defense counsel and, again, why we're,  
20   nonetheless, arguing--it's a reasonable alternative, the defense  
21   would certainly agree. First, ma'am, we would ask you to take a  
22   listen to that CD that we've provided you. It's an audio CD at the  
23   Article 32 officer's consideration of this; it might--we certainly

1 believe it will provide the Court with a greater understanding of the  
2 facts in this particular situation because it's closure with respect  
3 to a witness that would testify--or that was going to testify,  
4 telephonically, at the 32.

5 MJ: Is that when it's going to testify with respect to the  
6 motion that we have pending?

7 ADC[MAJ HURLEY]: No, ma'am----

8 MJ: Okay.

9 ADC[MAJ HURLEY]: ----she's not.

10 MJ: All right. I will certainly listen to the audio.

11 ADC[MAJ HURLEY]: So, that's--that--just a concern to make sure  
12 that we're all--if you'll pardon the colloquialism--on the same sheet  
13 of music--so that there's no--because any time you use terms,  
14 there's--or broking the potential of confusion on the parties. So,  
15 Your Honor, we would nonetheless require--or we would, nonetheless,  
16 request the Court be closed. Obviously, if you enter in--if you  
17 agree with the defense, you're going to have to rip--enter into  
18 certain findings of facts and conclusions of law as required by the  
19 fourth prong of in the R.C.M. 806(b)(2) inquiry, which is the last  
20 thing.

21 So, we would ask that you close it for your consideration  
22 of those last two factual instances, not the first one with Mr.  
23 Madrid, but the second two and, in the alternative, that we decide,

1 perhaps in an 802 conference tomorrow morning, if you're disinclined  
2 to have closure, decide on some language that we can use in order to  
3 avoid talking about the facts that underlie this motion to mitigate  
4 the harm that could come to PFC Manning.

5 MJ: All right.

6 ADC[MAJ HURLEY]: Thank you.

7 MJ: Thank you.

8 ADC[MAJ HURLEY]: You're welcome, ma'am.

9 MJ: Government?

10 ATC[CPT OVERGAARD]: Yes, ma'am.

11 MJ: Now, I don't have any kind of a written pleading on you  
12 with respect to the closure issues, is that correct?

13 ATC[CPT OVERGAARD]: That's correct, ma'am, it was in defense's  
14 response to our 404(b) which was Appellate Exhibit 250. And,  
15 actually, this is the first that the government is hearing that there  
16 were enclosures to the defense exhibit, so if we could get a copy of  
17 those enclosures.

18 ADC[MAJ HURLEY]: It's just the 32----

19 ATC[CPT OVERGAARD]: Okay.

20 ADC[MAJ HURLEY]: ----testimony of the second instance. And,  
21 ma'am, I apologize for that.

22 ATC[CPT OVERGAARD]: The closed portion?

23 ADC[MAJ HURLEY]: Yes, ma'am--or--yes.

1           ATC[CPT OVERGAARD]: Thank you, sir. With respect to the  
2 questions that the Court was just asking the defense, ma'am, the  
3 instance that we discussed in chambers and the possible way we could  
4 refer to that instance may be possible without referring to the  
5 incidents, but the other one may be somewhat difficult given the  
6 fact-specific nature of why the defense is disputing the government's  
7 argument--or the government's, I guess----

8           MJ: Are you talking about number two or number three?

9           ATC[CPT OVERGAARD]: I guess number two, yes, ma'am.

10          MJ: Statement or an incident?

11          ATC[CPT OVERGAARD]: Statement.

12          MJ: Okay.

13          ATC[CPT OVERGAARD]: And, ma'am, the government--you already  
14 stated on the record, ma'am, that case law has been strongly against  
15 closing the court-martial and has repeatedly--the Supreme Court and  
16 CAAF has reminded us of the importance of keeping these hearings open  
17 as well as R.C.M. 806(a) which tells us that, in general, courts-  
18 martial should be open to the public.

19           But, as the defense has stated, there are reasons that the  
20 court-martial could be closed if those four factors are met, but the  
21 government does not believe those four factors are met, ma'am, in  
22 large part, because we already have the pretrial order in place that  
23 the Court signed on 24 February 2012, ordering the current panel

1 members not to watch this media or if they see anything they  
2 shouldn't finish reading the article and then we have the extensive  
3 questionnaire that's going to the court members on 4 September which  
4 addresses the numerous--with numerous questions--any information that  
5 the panel members may have viewed to give them potential bias. And  
6 then, we'll also--currently, I have two days of *voir dire* scheduled  
7 for panel members which, again, will work at getting any potential  
8 bias if any panel members have reviewed information beyond what they  
9 should have or beyond, you know, what they could control at the time.  
10 But, otherwise, the government proffers that the panel members will  
11 obey the 24 February 2012 court order.

12 MJ: Let me ask you a couple of questions. The defense has  
13 alleged that this case has drawn a lot of pretrial publicity. Does  
14 the government agree with that?

15 ATC [CPT OVERGAARD]: Yes, ma'am.

16 MJ: And does the government object--or does either side object  
17 if I take judicial notice of that fact?

18 ATC [CPT OVERGAARD]: No, ma'am.

19 ADC [MAJ HURLEY]: The defense does not, ma'am.

20 MJ: Okay. Now, going from one of the test in Rule for Courts-  
21 Martial 806, does the government believe that preventing member  
22 biases is an overriding interest in this case?

1       ATC[CPT OVERGAARD]: Yes, ma'am, however, the government does  
2 not believe this drastic measure would be necessary to prevent member  
3 bias.

4       MJ: So, you don't believe closure is narrowly tailored to  
5 prevent member bias?

6       ATC[CPT OVERGAARD]: No, ma'am.

7       MJ: What reasonable alternatives do you propose?

8       ATC[CPT OVERGAARD]: The government believes that we already  
9 have reasonable alternatives in place with the 24 February court  
10 order, not--ordering members not to view any publicity related to PFC  
11 Manning as well as the questionnaire which asks specific questions  
12 about what information panel members have viewed in relation to PFC  
13 Manning in this case.

14       MJ: So, is the government's position that the underlying  
15 factual bases of this evidence should be disclosed in court and just  
16 relying on the protective order----

17       ATC[CPT OVERGAARD]: Yes, ma'am.

18       MJ: ----and the questionnaire for the members? So, no codes,  
19 no nothing, just discuss it all in open court?

20       ATC[CPT OVERGAARD]: Yes, ma'am.

21       MJ: For both instances?

22       ATC[CPT OVERGAARD]: Yes, ma'am.

23       MJ: Okay.

1           ATC[CPT OVERGAARD]: But, in the alternative, the government--  
2 or--if the Court does go with the code words, the government does not  
3 believe that--both the government and defense could adequately  
4 articulate their position in court. The statement, based on the  
5 government--or the defense's specific objections to the basis of the  
6 statement, etcetera, without actually going into what the statement  
7 was.

8           For example, the defense, in their motion, questions the  
9 motivation behind the state making the statement in the particular  
10 circumstance under which they were made. And----

11          MJ: Okay, then----

12          ATC[CPT OVERGAARD]: It just seems----

13          MJ: Why can't you talk about the motivations without talking  
14 about what was actually said?

15          ATC[CPT OVERGAARD]: It seems like it would draw--I mean, it  
16 would draw--because--we could, Your Honor, but it may be difficult to  
17 speak around it without actually implying what type of statement it  
18 was.

19          MJ: Okay. Go ahead.

20          ATC[CPT OVERGAARD]: That's all, ma'am, subject to your  
21 questions.

22          MJ: No, I've asked it all. Anything further from the defense?

1           ADC[MAJ HURLEY]: No, ma'am, unless you have some questions  
2 based on your conversation with the government counsel.

3           MJ: No, I don't think that I do.

4           ATC[CPT OVERGAARD]: I'm sorry, one moment, ma'am. Yes, ma'am,  
5 and just for the record, incident number two--or the incident, not  
6 the statement, was actually in--discussed in open court in the  
7 Article 32.

8           MJ: All right. Is the defense asking me to consider the  
9 attachment for purposes of both the closure issue and the actual  
10 merits, themselves?

11          ADC[MAJ HURLEY]: Yes, ma'am, that would fine.

12          MJ: All right. The Court will take this under advisement and  
13 issue a ruling first thing tomorrow. And the government is going to  
14 advise both the defense and me if there's any additional M.R.E.  
15 404(b) evidence we're going to consider tomorrow, is that correct?

16          ATC[CPT OVERGAARD]: Yes, ma'am.

17          MJ: Okay.

18          TC[MAJ FEIN]: Your Honor, may we had a quick moment?

19          MJ: Yes. While the government is conferring, Defense, I know  
20 this is an appellate--attachment for the actual appellate exhibit for  
21 the Court for the record. Is there a second copy of this or is this  
22 the only copy?

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Army and Navy use DD Form 491 for records of trial in general and special court-martial cases in which a summarized record is authorized. Inapplicable words of the printed text will be deleted.

**COPIES** - See MCM, 1984, RCM 1103(g). The convening authority may direct the preparation of additional copies.

**ARRANGEMENT** - When forwarded to the appropriate Judge Advocate General or for judge advocate review pursuant to Article 64(a), the record will be arranged and bound with allied papers in the sequence indicated below. Trial counsel is responsible for arranging the record as indicated, except that items 6, 7, and 15e will be inserted by the convening or reviewing authority, as appropriate, and items 10 and 14 will be inserted by either trial counsel or the convening or reviewing authority, whichever has custody of them.

1. Front cover and inside front cover (chronology sheet) of DD Form 490.
2. Judge advocate's review pursuant to Article 64(a), if any.
3. Request of accused for appellate defense counsel, or waiver/withdrawal of appellate rights, if applicable.
4. Briefs of counsel submitted after trial, if any (Article 38(c)).
5. DD Form 494, "Court-Martial Data Sheet."
6. Court-martial orders promulgating the result of trial as to each accused, in 10 copies when the record is verbatim and in 4 copies when it is summarized.
7. When required, signed recommendation of staff judge advocate or legal officer, in duplicate, together with all clemency papers, including clemency recommendations by court members.

8. Matters submitted by the accused pursuant to Article 60 (MCM, 1984, RCM 1105).
9. DD Form 458, "Charge Sheet" (unless included at the point of arraignment in the record).
10. Congressional inquiries and replies, if any.
11. DD Form 457, "Investigating Officer's Report," pursuant to Article 32, if such investigation was conducted, followed by any other papers which accompanied the charges when referred for trial, unless included in the record of trial proper.
12. Advice of staff judge advocate or legal officer, when prepared pursuant to Article 34 or otherwise.
13. Requests by counsel and action of the convening authority taken thereon (e.g., requests concerning delay, witnesses and depositions).
14. Records of former trials.
15. Record of trial in the following order:
  - a. Errata sheet, if any.
  - b. Index sheet with reverse side containing receipt of accused or defense counsel for copy of record or certificate in lieu of receipt.
  - c. Record of proceedings in court, including Article 39(a) sessions, if any.
  - d. Authentication sheet, followed by certificate of correction, if any.
  - e. Action of convening authority and, if appropriate, action of officer exercising general court-martial jurisdiction.
  - f. Exhibits admitted in evidence.
  - g. Exhibits not received in evidence. The page of the record of trial where each exhibit was offered and rejected will be noted on the front of each exhibit.
  - h. Appellate exhibits, such as proposed instructions, written offers of proof or preliminary evidence (real or documentary), and briefs of counsel submitted at trial.